## SUBJECT INDEX

PAGE

## INDEX TO APPENDICES

PAGE

# TABLE OF AUTHORITIES CITED

CASES PAGE

PAGE

PAGE

TEXTS PAGE

CALIFORNIA STATUTES PAGE

CALIFORNIA DOCUMENTS



WATER RIGHTS BOARD DECISIONS

UNITED STATES DOCUMENTS PAGE

PAGE



UNITED STATES STATUTES

PAGE

## Exhibits

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. 51.

CITY OF FRESNO, *Appellant,*

*vs.*

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, *et al.*, *Respondents.*

**Appeal From Opinion of the United States Court of Appeals for the Ninth Circuit.**

## BRIEF OF PETITIONER.

The City of Fresno appeals from the Opinion in the above entitled case from the United States Court of Appeals for the Ninth Circuit entered March 31, 1961, as amended by supplemental Opinion entered by said Court on the 14th day of August, 1961, and as amended by decision on rehearing by the Opinion of said Court on the 14th day of February, 1962.

The Opinion of the Court below of March 31, 1961, was not printed in any official publication but was combined with the amendment to said Opinion dated August 14, 1961, and both appear as one Opinion in *State of California, United States of America v. Rank*, 293 F. 2d 340 (1961) in the official reports. As stated, this Opinion set forth in the official reports was again slightly amended by an Opinion of the Court below on rehearing dated the 14th day of February, 1962, which is not printed, but is set forth on page 1 of the Appendix to this brief. The difference

in the actual dates and Opinions as compared to the published Decision is pointed out just so that this Court may see that the various steps on certiorari and appeal were filed in proper time.

## I.

## OPINIONS IN THE COURTS BELOW.

### A. Opinions in the District Court.

The Opinion of the District Court on the trial on the merits in this case is reported as *Rank v. (Krug) United States*, in 142 F. Supp. 1 (1956).

The same District Court rendered an earlier companion Opinion, *Rank v. Krug*, 90 F. Supp. 773 (1950), on respondents' motion to strike the complaint in this case covering many of the identical issues of this case on the trial on the merits in the District Court (*Rank v. (Krug) United States*, 142 F. Supp. 1 (1956)), *which Decision in* 90 F. Supp. 773 (1950) *is cited with approval by this Court in United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).[1]

To other Opinions in the District Court also involve this same case. These decisions are *Rank v. United States*, 16 F. R. D. 310 (1954), which is not particularly material to this appeal; and *City of Fresno v. Edmonston*, 131 F. Supp. 421 (1955), in which case the District Court as an ancillary proceeding enjoined the California State Engineer, whose duties are now performed by the California Water Rights Board, from

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[1] "22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed 1231 (1950).

interfering with the jurisdiction of the District Court on the trial on the merits in this case by attempting to pass on the applications of the City of Fresno and the United States to appropriate waters of the San Joaquin River before the District Court in this case could make a decision on whether a hearing on these applications to appropriate before the State Engineer was necessary in view of the long delay of the State Engineer to act on said applications to appropriate and before the District Court in this case could make a declaratory judgment on the question of whether the City of Fresno's domestic and municipal applications to appropriate water had priority over the applications of the United States to appropriate water under the California domestic and municipal priority and the California County of Watershed and County of Origin priority laws. Respondents appealed this decision of the District Court to the Ninth Circuit Court of Appeals, *Holsinger v. City of Fresno*, but on motion of Appellant City of Fresno this appeal was dismissed by the Court below on June 18, 1957. (*Holsinger v. City of Fresno*, 246 F. 2d 263 (1957)).

The District Court in this case, *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), gave a declaratory judgment that the applications for water of the City of Fresno for domestic and municipal use had priority over any rights of the United States,[2] but held that nevertheless the administrative agency, the State Engineer (now the California Water Rights Board), had to first hear and rule on the applications before a court could review them,[3] and then ordered the injunc-

[2] *Rank v. (Krug) United States*, 142 F. Supp. 1, 184 (1956).
[3] *Rank v. (Krug) United States*, 142 F. Supp. 1, 182-184 (1956).

tion granted in *City of Fresno v. Edmonston*, 131 F. Supp. 421 (1955) dissolved, so that the State Engineer (now the California Water Rights Board) could pass on said applications to appropriate.[4] *This Court has* also ruled that the Bureau *must file applications to appropriate water* in the western states under the Basic Reclamation Law of 1902 as amended.[5]

## B. Decision of the California Water Rights Board No. D-935, June 2, 1959.

After the Decision of the District Court in this case (142 F. Supp. 1 (1956)), the State Waters Rights Board being relieved from the injunction in *City of Fresno v. Edmonston, supra*, rendered its decision on the applications of the City of Fresno and the United States to appropriate waters of the San Joaquin River (Decision No. D-935, June 2, 1959), after a hearing lasting eighteen months in which the appellant City of Fresno, the United States of America and all respondent irrigation districts, including both respondent Madera Irrigation District and Respondent South San Joaquin Municipal Utility District, voluntarily appeared and participated. Under California law this Decision was subject to a judicial review by the courts. The City of Fresno filed a petition to review but the United States did not. The appellant City of Fresno then dismissed its petition to review with prejudice. This decision of the California Water Rights Board has now become final as to all parties in this case including the appellant City of Fresno, the respondent irrigation districts and the United States of America.[6]

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[4]*Rank v. (Krug) United States*, 142 F. Supp. 1, 183 (1956).

[5]*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

[6]This Decision granted the disputed application to appropriate

## C. Opinions in the Court Below.

The opinion of the Court of Appeals dated and entered March 31, 1961, as amended and explained by Opinion of said Ninth Circuit Court of Appeals on rehearing dated and entered the 14th day of August, 1961, as heretofore stated appears as a combined opinion in *State of California, United States of America v. Rank*, 293 F. 2d 340, 360 (1961) and was further supplemented by Opinion on Rehearing dated February 14, 1962, *State of California, United States of America v. Rank*, which as stated does not appear as yet to have been printed in the official reporter.

Two other earlier opinions of the Court below in addition to *Holsinger v. City of Fresno*, 246 F. 2d 263 (1957), also involve this case. They are *United States v. United States District Court*, 206 F. 2d 303 (9th Cir.) (1953) and *State of California v. United States District Court*, 213 F. 2d 818 (9th Cir.) (1954), in which the United States unsuccessfully tried to prevent the District Court from rendering judgment in this case by petitions for writ of mandate and prohibition directed to the District Court, which petitions were denied by the Court below.

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water of the San Joaquin River to the United States and denied the City of Fresno's application to appropriate, but provided that the United States "shall provide water to the City of Fresno out of the Central Valley Project of not less than 50,000 acre-feet after execution of water service contracts with the United States, all in accordance with Federal Reclamation laws; *and subject to such provisions as may be imposed by Final judgment on Rank v. Krug*" (the case presently before this Court) and further providing in substance that the City of Fresno under such contract was to receive only Class I irrigation water without any domestic or municipal priority in years of shortage, as the respondent officials had done in contracts with other California cities.

## II.
## JURISDICTION.

The Court below first rendered an Opinion in this case on March 31, 1961. The City of Fresno, petitioner herein, filed a petition for rehearing on the 1st day of June, 1961, in the Court of Appeals, which was denied by the Court of Appeals on August 14, 1961. By order of Mr. Justice Douglas dated November 3, 1961, the time for the City of Fresno, petitioner herein, to file a Petition for Writ of Certiorari was extended to and including December 12, 1961. The petition for certiorari was filed December 11, 1961, and was granted April 2, 1962.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

The basis for jurisdiction of the District Court was 28 U. S. C. 1331.

## III.
## THE CONSTITUTIONAL PROVISIONS, STATUTES AND DOCUMENTS WHICH THE CASE INVOLVES.

### A. Constitution of the United States.

1. First and Fifth Amendments to the Constitution of the United States (see Appendix page 3)

### B. Acts of Congress.

1. Act of March 3, 1877, 19 Stat. 377 (see Appendix page 5)
2. Act of June 17, 1902, 32 Stat. 388 at 389-390, Sec. 4 and 8 (43 U. S. C. 391) (see Appendix page 6)
3. Act of April 16, 1906, 34 Stat. 116 and 117 (see Appendix page 7)

4. Act of February 25, 1920, 41 Stat. 451 and 452 (see Appendix page 8)
5. Act of June 10, 1920, 41 Stat. 1063 at 1077 (see Appendix page 8)
6. Act of December 5, 1924, 43 Stat. 672 at 702 (see Appendix page 9)
7. Act of December 21, 1928, 45 Stat. 1057 at 1059-1060 (see Appendix page 11)
8. Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (see Appendix page 11)
9. Act of August 30, 1935, 49 Stat. 1028 and 1038 (see Appendix page 12)
10. Act of June 22, 1936, 49 Stat. 1597 at 1622 (see Appendix page 12)
11. Act of August 26, 1937, 50 Stat. 844 at 850 (see Appendix page 14)
12. Act of August 4, 1939, 53 Stat. 1187 at 1194 (see Appendix page 14)
13. Act of October 17, 1940, 54 Stat. 1198 and 1200 (see Appendix page 15)
14. Act of December 22, 1944, 58 Stat. 887 at 889-890 (see Appendix page 16)
15. Act of October 14, 1949, 63 Stat. 852 and 853 (see Appendix page 16)
16. Act of September 26, 1950, 64 Stat. 1036 (see Appendix page 17)
17. Act of July 10, 1952, 66 Stat. 516 at 560 (see Appendix page 18)
18. Act of July 2, 1956, 70 Stat. 483 at 484 (see Appendix page 19)
19. Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(d) (see Appendix page 19)

20. Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(i) (see Appendix page 19)
21. 28 U. S. C. 1254 (1)
22. 28 U. S. C. 1442 (a) (3)

### C. Federal Documents.

1. Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935. (Issued in accordance with the Act of December 5, 1924, 43 Stat. 672 at 702, Section 4, Subsection B) (see Appendix page 20)
2. Document 35, 73rd Congress (see Appendix page 30)

### D. State of California Constitution and Statutes.

1. California Constitution, Article XIV, Sec. 3 (see Appendix page 31)
2. California Water Code Sections: 104, 106, 1254, 1460, 10500, 10504, 10505, 11126, 11127, 11128, 11207, 11225, 11226, 11460 and 11463 (see Appendix page 32)
3. Statutes of California, 1933, 50th Session, Chapter 1043, 2643 to 2645. (Approved by the Governor August 5, 1933; initiative vote of People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934) (see Appendix page 37)
4. Code of Civil Procedure of California, Sections 382 and 1094.5.
5. Title 23, Article 11, Section 712, State of California Administrative Code.

## IV.

## QUESTIONS PRESENTED FOR REVIEW.

1. Whether the determination of the limits of the statutory authority of administrative officials of the United States under the Constitution and Acts of Congress is a judicial or administrative determination.

2. Whether the determination of whether respondent administrative officials of the United States Bureau of Reclamation in this case are acting in excess of and in violation of the authority granted them by the Constitution, the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress providing for the construction and operation of the Central Valley Project in California and other Acts of Congress is a judicial or an administrative determination as ruled by the Court below.

3. Whether the respondent Bureau of Reclamation officials in the construction and operation of the Central Valley Project and other respondents are acting illegally, arbitrarily, unreasonably, capriciously and in excess of and in violation of the authority granted and conferred upon them by the Constitution, the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and the Acts of Congress providing for the construction and operation of the Central Valley Project of California which require respondent Bureau of Reclamation officials to proceed in conformity with State laws relating to the ownership, control, use, appropriation or distribution of water in the construction and operation of the Central Valley Project of California.

4. Whether respondent Bureau of Reclamation officials are required by the Basic Reclamation Act of

June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and other Acts of Congress relating to the construction and operation of the Central Valley Project of California are bound by and required to obey and carry out municipal and domestic water priority laws of the State of California in the construction and operation of the Central Valley Project; and whether respondents are acting illegally and in excess of and in violation of the authority conferred upon them by the Constitution and said Acts of Congress in failing and refusing to carry out such laws.

5. Whether the respondent Bureau of Reclamation officials are required by the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress relating to the construction and operation of the Central Valley Project of California and particularly by the Act of October 14, 1949, 63 Stat. 852 and 853, to reserve for those California counties of origin of river waters and watersheds where river waters originate sufficient water to satisfy the needs of said counties and watersheds in which water originates before exporting said water out of the county and watershed of origin and particularly whether respondent Bureau of Reclamation officials are required by said laws to reserve sufficient water for the original plaintiffs owning riparian lands along the San Joaquin River between Friant Dam and Gravelly Ford Canal and for appellant City of Fresno for its domestic and municipal water uses, which city lies in both the county of origin and watershed of the San Joaquin River.

6. Whether even Congress itself can authorize the taking by respondent officials by eminent domain or condemnation proceedings of appellant City of Fresno's domestic and municipal underground percolating water

supply percolating from the San Joaquin River and which is admittedly pumped, used and is vitally needed for domestic and municipal uses by its citizens for maintenance of their lives and health for secondary agricultural uses by respondent irrigation districts where the City has no other available domestic and municipal supply of water.

7. Whether the determination of the question of whether respondent Bureau of Reclamation officials are illegally and unlawfully adding charges in their water rates out of the Central Valley Project in excess of the charges authorized by Congress is an administrative determination or a judicial determination as ruled by the Court below.

8. Whether, where Congress has limited the charge which may be made by respondent Bureau of Reclamation officials for municipal and domestic water out of the Central Valley Project to repayment of (1) cost of construction of the project allocated to municipal use; (2) to cost of operation and maintenance of such portion of the project during the period of repayment of the same, and (3) to interest. Respondent Bureau of Reclamation officials are acting illegally and in excess of the authority conferred upon them by Congress by unreasonably, arbitrarily, capriciously and in excess of their administrative discretion adding a profit to said authorized charges for municipal and domestic water and other water authorized by Congress supplied from said Central Valley Project, and whether said respondents are using said profit for illegal purposes.

9. Whether one or more of the named plaintiffs in this action may prosecute the class action which is a part of this case.

10. Whether the determination of the question of whether any charge by respondent Bureau of Reclamation officials in excess of $3.50 per acre-foot for water out of the Central Valley Project to appellant City of Fresno (The Class I irrigation water charge) was unreasonable, illegal, arbitrary, capricious or an abuse of respondents' administrative discretion and in excess of the authority conferred upon them by Congress was a judicial determination as found by the District Court or an administrative determination as held by the Court below, and whether the determination of such a question is a suit against the United States.

11. Whether respondent Bureau of Reclamation officials were authorized by Congress to take the riparian and overlying percolating water rights of the landowners between Friant Dam and Gravelly Ford Canal, including those percolating water rights of appellant City of Fresno, by either eminent domain or condemnation and whether the determination of this question is a judicial determination or an administrative determination.

12. Whether respondents can raise questions for the first time in their appeal briefs or in petitions for rehearing that were not designated in their designation of points on appeal as required by Rule 75(d) Federal Rules of Civil Procedure (28 U. S. C. 75(d)) and particularly whether respondent Bureau of Reclamation officials can raise for the first time the question of whether the District Court's decision that any charge of the respondent Bureau of Reclamation officials in excess of $3.50 per acre-foot for water from the Central Valley Project (the charge for Class I irrigation water) to appellant, the City of Fresno, was unreason-

able, unlawful and in excess of the authority conferred upon respondents by Congress was not sustained by the evidence where no such point was set forth in respondents' designation of points on appeal in the Court below nor by respondents in their petitions for certiorari, and where the Court below did not find that the District Court's determination that the charge to appellant, the City of Fresno, in excess of $3.50 per acre-foot for water was unreasonable was not sustained by the evidence.

13. Whether the United States waived its immunity to suit in this case and whether the Court below properly dismissed the United States as a party defendant, after it had been joined as a defendant in this suit by the District Court.

14. Whether the respondent irrigation districts were proper parties herein and as such may be relieved from the injunction of the lower Court where with two exceptions they had voluntarily intervened in the case and where *all* respondent districts asked for affirmative relief throughout the trial in the District Court, to wit, a physical solution, can for the first time on a motion for rehearing after Decision by the Court below, and without designating such right to a dismissal or relief from the injunction of the lower Court in its designation of points on appeal under Rule 75(d), Federal Rules of Civil Procedure (28 U. S. C. 75(d)), or in their appeal brief ask that they be dismissed from this action and relieved from said injunction of said District Court.

## V.
## STATEMENT OF THE CASE.

*City of Fresno v. State of California, et al.* (No. 51, October Term, 1962), is a water rights case.

This case is *NOT* an attempt by the City of Fresno and the farmers and other original plaintiffs along the 38-mile stretch of the San Joaquin River below Friant Dam to interfere with the operation of the Central Valley Project as authorized by Congress.

TO THE CONTRARY, THE EFFORTS OF THE CITY OF FRESNO AND THE FARMERS IN THIS CASE ARE DIRECTED TO SPECIFICALLY SEEING THAT THESE GREAT PLANS KNOWN AS THE CENTRAL VALLEY PROJECT OF CALIFORNIA, AS AUTHORIZED BY CONGRESS, ARE CARRIED OUT.

### A. Geographic and Physical Features of the Central Valley Project.

The overall plan of the Central Valley Project in California has been described in the decision of this Court in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950); and *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958). It is also described by the Court below in *State of California, United States of America v. Rank*, 293 F. 2d 340 (1961) and by the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) (which case is now entitled *City of Fresno v. California, et al.* (No. 51, October Term, 1962) before this Court), and in *Rank v. Krug*, 90 F. Supp. 773 (1950), which decision of the District Court on motion to dismiss in this case was cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

As this Court stated in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 728, 70 S. Ct. 955, 957, 94 L. Ed. 1231 (1950).

> "Central Valley is a vast basin, stretching over 400 miles on its polar axis and a hundred in width, in the heart of California. Bounded by the Sierra Nevada on the east and by coastal ranges on the west, it consists actually of two separate river valleys which merge in a single pass to the sea at the Golden Gate."

The northern half of the Central Valley of California is known as the Sacramento Valley and the southern half is known as the San Joaquin Valley.

> "The northern half of this valley is known as the Sacramento Valley and is the valley of the Sacramento River * * *.
>
> "The southern half of the Central Valley is known as the San Joaquin Valley and is the valley of the San Joaquin River."
>
> *State of California, United States of America v. Rank*, 293 F. 2d 340, 342 (1961).

As stated by this Court in *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958), the Sacramento and San Joaquin Rivers which drain the two valleys comprising the Central Valley of California, join in their deltas and flow out to sea through San Francisco Bay.

> "The Sacramento River, with headwaters near Mount Shasta, flows south into San Francisco Bay, draining the northern portion of the basin. The San Joaquin River, which rises above Friant

in the south, runs first west then north to join the Sacramento River in the Sacramento-San Joaquin Delta, both finding a common outlet to the ocean through San Francisco Bay.'

On the opposite page is a map (Exhibit I of this brief) showing the location of the Central Valley and its division into the Sacramento and San Joaquin Valleys, the location of the San Joaquin and Sacramento Rivers *and the location of appellant City of Fresno* in the San Joaquin Valley.[7]

The location of all of the principal features of the Central Valley Project with the exception of Shasta Dam (which, however, is shown on Exhibit I hereof) are shown on Exhibit II of this brief, which Exhibit II is set forth for the convenience of this Court, immediately following this page. This map (Exhibit II hereof) was prepared by the United States Bureau of Reclamation at the request of the District Judge in this case. This map is also to be found in *Rank v. (Krug) United States*, 142 F. Supp. 1, 40-41. This map shows all of the Central Valley Project south of San Francisco Bay (the southern part of San Francisco Bay being designated on said map (Exhibit II hereof) as "Suisun Bay").

Briefly, the Central Valley Project contemplated taking the waters of the San Joaquin River, which formerly were diverted at "Mendota Pool", (shown on Ex-

[7]This map was prepared by the United States Bureau of Reclamation and appears as Plate I of Plaintiffs' Exhibit 143 of this case. For the convenience of this Court, however, there has been added to this map by the engineering department of the Fresno City Municipal Water Department arrows and letters designating the location of San Francisco Bay, Shasta Dam and Friant Dam and some lettering has been enlarged. It is for illustrative purposes only.

# EXHIBIT I.

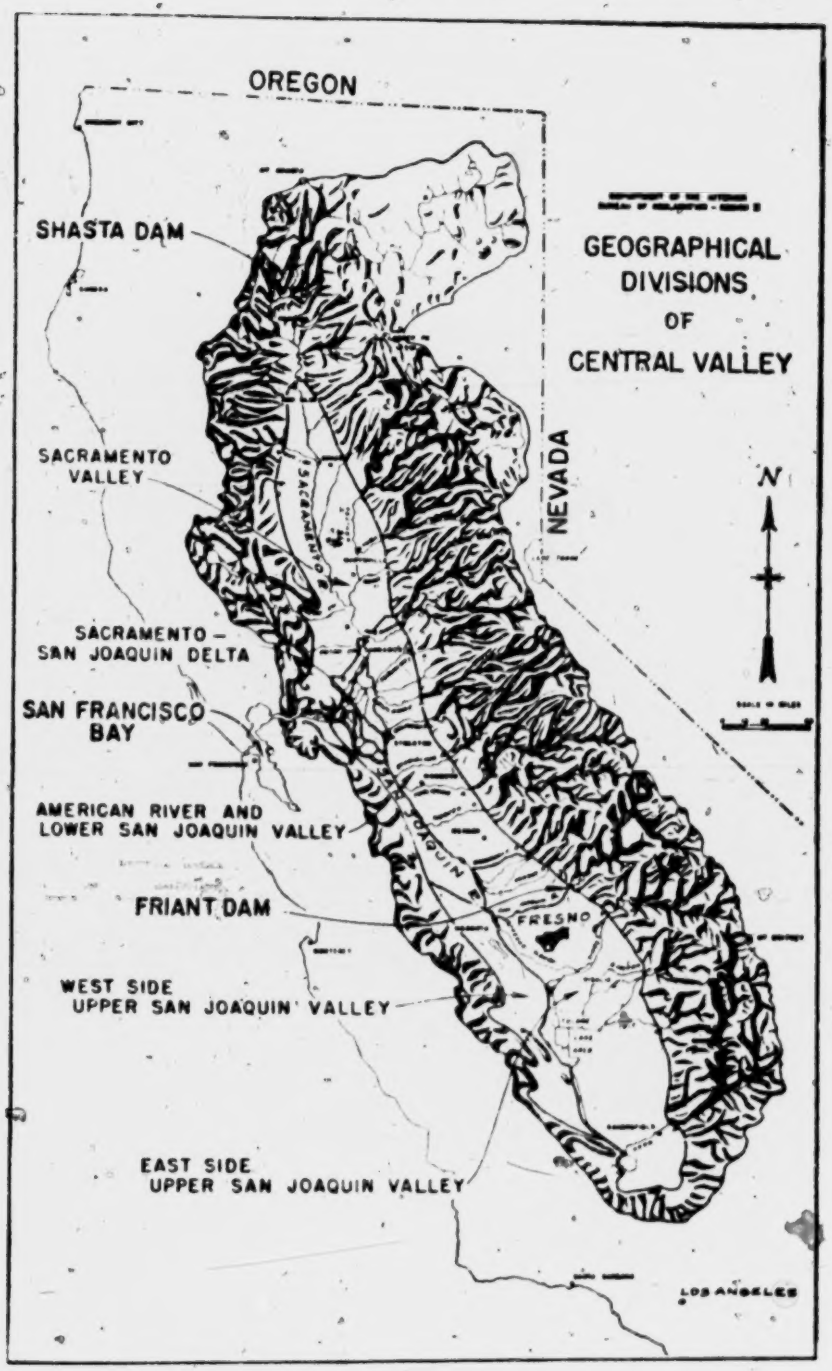
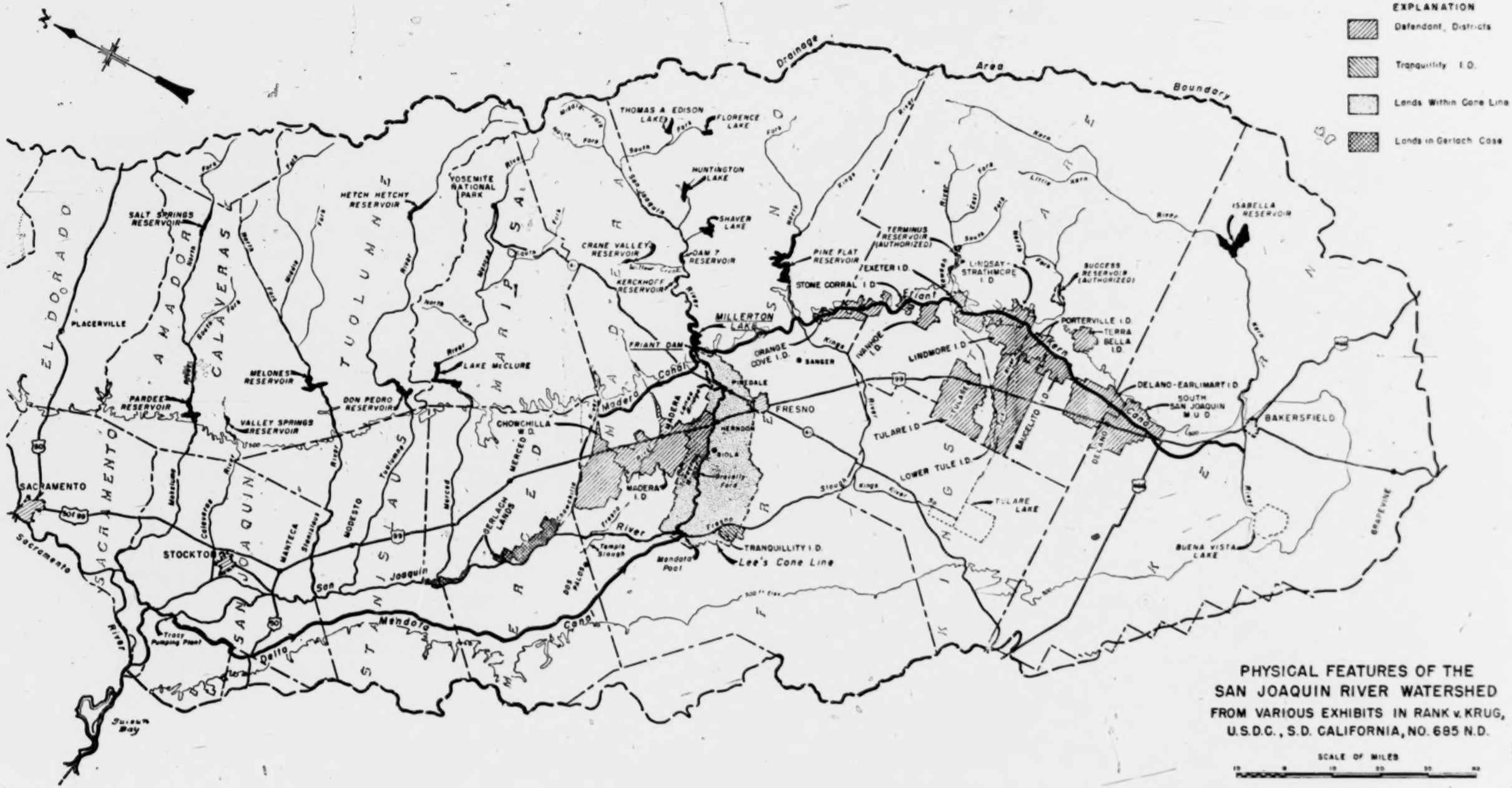

OREGON
SHASTA DAM
GEOGRAPHICAL
DIVISIONS
OF
CENTRAL VALLEY
SACRAMENTO
VALLEY
SACRAMENTO R.
NEVADA
N
SACRAMENTO –
SAN JOAQUIN DELTA
SAN FRANCISCO
BAY
AMERICAN RIVER AND
LOWER SAN JOAQUIN VALLEY
SAN JOAQUIN R.
FRIANT DAM
FRESNO
WEST SIDE
UPPER SAN JOAQUIN VALLEY
EAST SIDE
UPPER SAN JOAQUIN VALLEY
LOS ANGELES

**EXHIBIT II.**




## PHYSICAL FEATURES OF THE SAN JOAQUIN RIVER WATERSHED

FROM VARIOUS EXHIBITS IN RANK v. KRUG, U.S.D.C., S.D. CALIFORNIA, NO. 685 N.D.

SCALE OF MILES

10 0 10 20 30 40

hibit II hereof) diverting them at Friant Dam (shown on both Exhibit I and Exhibit II hereof) into the Madera Canal and Friant-Kern Canals for use in the *six* counties of the San Joaquin Valley, including *Fresno County,* for both irrigation and *municipal* purposes.

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno,* Tulare, Kings and Kern in the State of California." (emphasis ours)
>
> *Gerlach Live Stock Co. v. United States,* 111 Ct. Cls. 1, 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes *including cities* * * *." (emphasis ours)

*United States v. Gerlach Live Stock Co.,* 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest this flow and regulate its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes * * *." (emphasis ours)

*Ivanhoe Irrigation District v. McCracken,* 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

The water which was formerly diverted at Mendota Pool (shown on Exhibit II hereof) was to be replaced with Sacramento River water pumped up the Delta-Mendota Canal from the junction of the Sacramento and the San Joaquin Rivers.[8]

The above purposes of the Central Valley Project will be discussed in detail under the subchapter entitled "Legislative History of the Central Valley Project" *infra.*

The major physical features of the Central Valley Project and their estimated costs are set forth in the Feasibility Report signed by President Roosevelt on December 2, 1935, which Feasibility Report this Court has found to be the basis of the Central Valley Project as authorized by Congress.[9] This Feasibility Report

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[8]"* * * the plan as originally adopted and as carried out by the Bureau included *replacement* at great expense of all water formerly used for *crops* and 'controlled grasslands' * * *." (emphasis ours)

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"Delta-Mendota Canal will carry surplus Sacramento River water 120 miles southerly from the Delta to Mendota Pool on San Joaquin River. Here the water will be used to meet the demands of *crop* lands now irrigated by diversions from *San Joaquin River.*" (emphasis ours)

R. 326 (New Volume) Pltf. Ex. 143, "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Planning Report No. 2-4.0-3, November, 1945, page 7, Rep. Tr. 6572.

[9]"But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navi-

of December 2, 1935, is set forth in full in Appendix "D" to this brief.

The major items of the Central Valley Project and their estimated cost as set forth in the Feasibility Report of December 2, 1935, are as follows:[10]

"ESTIMATED COST OF PROJECT

| | |
|---|---|
| "Kennett Dam (now named Shasta Dam),[11] reservoir and power plants | $ 84,000,000 |
| Kennett transmission line and substation | 14,000,000 |
| Contra Costa Conduit | 2,500,000 |
| San Joaquin Pumping System (now Delta-Mendota Canal and Tracy Pumping System[12] | 19,000,000 |
| Friant Dam and reservoir | 14,000,000 |
| Friant-Kern Canal | 26,000,000 |
| Madera Canal | 3,000,000 |
| Rights of way, water rights and general expenses | 8,000,000 |
| (Emphasis ours) Total | $170,000,000" |

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt December 2, 1935, Appendix "D" hereof.

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gation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

[10]Since the construction and commencement of operation of the original features of the Central Valley Project as set forth in the Feasibility Report of December 2, 1935, Congress has added other features to the Central Valley Project such as the Folsom Dam on the American River and the Trinity River Project.

[11]Shasta Dam is referred to in the Feasibility Report as Kennett Dam and appears on Exhibit I of this brief. Kennett was a small town formerly located at the base of Shasta Dam where a water gauge on the Sacramento River was maintained and which town of Kennett had to be removed in order to build Shasta Dam; the name Shasta being later given to the dam.

[12]"*Delta Mendota Canal* will carry surplus Sacramento River water 120 miles southerly from the Delta *to Mendota Pool* on San Joaquin River. Here the water will be used to meet the demands of *crop* lands now irrigated by diversions from *San Joaquin River.*" (emphasis ours)

R. 326 (new Volume) Pltf. Ex. 143, "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Planning Report No. 2-4.0-3, November, 1945, page 7, Rep. Tr. 6572.

Other physical features involved in the Central Valley Project not mentioned in the Feasibility Report, but which are material to this case, are, for the convenience of this Court, set forth:

**1. Sacramento River.**

The Sacramento River which drains the Sacramento Valley is shown on Exhibit I hereof. Only a portion of this river is shown on Exhibit II hereof. It has an average annual flow measured at Sacramento of 17,100,000 acre-feet per year.[13]

**2. San Joaquin River.**

The San Joaquin River is shown on both Exhibit I and Exhibit II hereof. It has an average flow of only 1,751,500 acre-feet measured at Friant Dam.[14] It has an average flow per second-feet of 2,456 cubic feet per second[15] and a maximum flow of 40,069 cubic-feet per second.[16] It arises in Fresno and Madera Counties.[17] It debauches from the Sierra Nevada Mountains at Friant Dam in Fresno County (shown on both Exhibits I and II hereof). Forty-seven miles westward from where it debauches from the Sierra Nevada Mountains at Friant Dam, it reaches Mendota Dam (indicated on Exhibit II as "Mendota Pool") and then turns and flows northwest to its junction with the

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[13]U.S.G.S. Water Supply Paper #1715. page 587.

[14]R. 2281, 2933, Pltf. Ex. 106-A; Deft. Ex. A-14-A, Rep. Tr. 13,994.

[15]R. 2339, Deft. Ex. A-9-A, 13,353.

[16]Deft. Ex. A-7-A-3, Rep. Tr. 13,293; Deft. Ex. A-7-A-4, Rep. Tr. 13,317.

[17]"* * *. The San Joaquin River is a natural water course arising in the Sierra-Nevada in *Fresno* and Madera Counties." (emphasis ours)

*Meridian, Ltd. v. San Francisco*, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

Sacramento River at San Francisco Bay, shown on Exhibit II hereof as "Suisun Bay", a branch of San Francisco Bay.

### 3. Merced River.

The Merced River is one of the main branches of the San Joaquin River. It joins the San Joaquin River 144 miles downstream from Friant Dam[18] which junction marks the downstream end of that portion of the waters of the San Joaquin River to be taken under the Central Valley Project.[19]

### 4. Gravelly Ford Canal.

This canal takes off from the San Joaquin River at a point 38 miles downstream from Friant Dam. The location of Gravelly Ford Canal is also shown in greater detail in defendants' Exhibit A-9-A-1, R. 2340, 13,361. This point, as will be shown under our discussion of the legislative history of the Central Valley Project, *infra*, marks the downstream end of the waters of the San Joaquin River to be supplied by Friant Dam.[20]

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[18]1944 Report Chief of Army Engineers, page 29.

[19]"DEFINITION OF RIGHTS TO THE WATERS OF THE SAN JOAQUIN RIVER PROPOSED FOR DIVERSION TO UPPER SAN JOAQUIN VALLEY.

"INTRODUCTION.

"This report presents a definition of the rights to San Joaquin River water which it is assumed appertain to lands receiving water from the river between the Gravelly Ford Canal and Merced River. Under the Central Valley Project, it is proposed to acquire (by purchase, exchange, and appropriation) the right to utilize the waters of the San Joaquin River inhering in these rights, * * *."

Pltf. Ex. 410, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley," August, 1936, Water Project Authority, State of California, Page 1, Rep. Tr. 23,206.

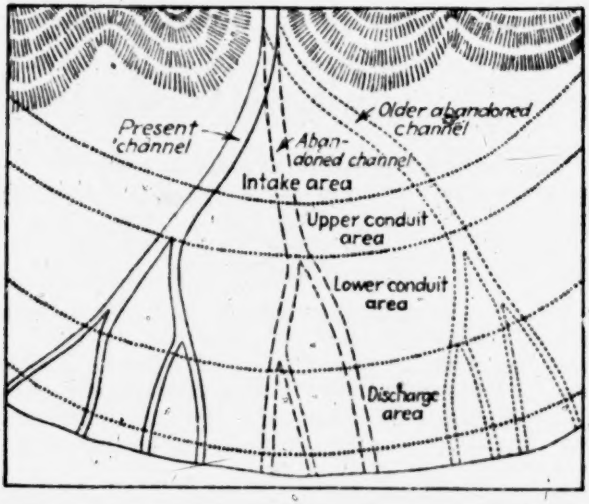
[20]"9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River

### 5. The San Joaquin Alluvial Cone.

The San Joaquin alluvial cone is shown in Exhibit II hereof by the symbols "Lee's Line" and covers an area between Friant Dam and Mendota Pool. In California a percolating water right is the same or analogous to a riparian right. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935).)

(a) *Description of an Alluvial Cone.*

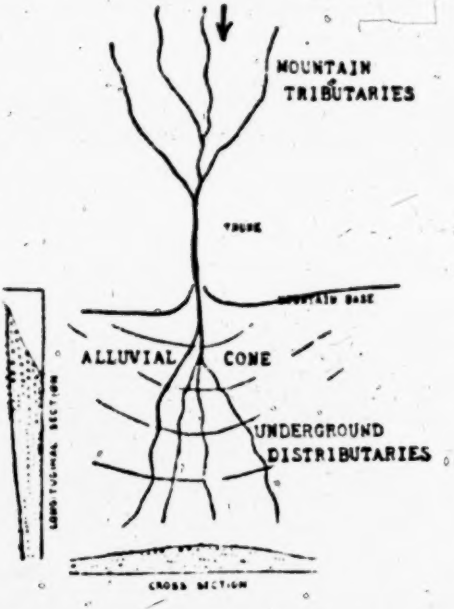
A diagram from Professor Tolman of the Stanford University Geology Department [R. 2267] shows the typical abandoned channels of a river known as "Pipes" or "aquifers" which carry the percolating water from the river throughout the alluvial cone. We here reproduce such diagram [R. 2267] for the convenience of the Court.[21]




originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *" (emphasis ours) *Wolfsen v. United States*, 162 F. Supp. 403, 411 (1958).

[21]"Alluvial cones are the chief bearers of available ground

Weil's conception of these ancient abandoned stream channels or "pipes" which carry water throughout the alluvial cone are here given.[22]




That the San Joaquin percolated over 211,000 acre-feet of water into its alluvial cone annually before the construction of Friant Dam is even admitted by the respondent Bureau of Reclamation engineers.[23]

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water. These are by far the most important source of water in the arid and semi-arid Southwest."

R. 2269, Pltf. Ex. 68,—Tolman on Groundwater, 522.

[22]50 Harvard Law Review 252 (1937).

[23]"The Court: Do you have an opinion as to the amount of water that seeps between Friant and Mendota?

The Witness (making calculation): 292 second-feet.

The Court: In other words, and additional 92 second-feet?

The Witness: That is correct.

Now, that question was asked you by the Court, and you gave that answer didn't you? A. I did.

Q. How many acre-feet per year will 292 second-feet seeping continuously produce? A. 211,000 acre-feet.

Q. 211,000? A. Yes."

R. 1992, Testimony of Harry Barnes, Engineer for the Bureau of Reclamation, Rep. Tr. 16,974.

(b) *All Parties in the District Court Agree That Eventually the Bureau of Reclamation Unless Enjoined by This Court May Attempt to Cut Down the Flow of Water Below Friant Dam to 60,000 Acre-Feet.*

That the Bureau eventually intends to cut down the annual flow of the San Joaquin River to 60,000 acre-feet per year is admitted by Witness Leland Hill of the Bureau,[24] although as will be hereafter shown respondents have discharged an average 626,000 acre-feet per year from Friant Dam to Gravelly Ford for nine years[25] beginning in 1951 in order to actually carry out their plan of physical solution.

(c) *The District Court Found That the Percolating Water Rights of 200,000 Acres of the Alluvial Cone of the San Joaquin Would Be Damaged and 100,000 Acres of the Most Valuable Land in the San Joaquin River Would be Destroyed For Agricultural Use By the Construction and Proposed Operation of Friant Dam by Respondents Unless the Court's Plan of Physical Solution is Adopted.*

The District Court found that 100,000 acres of the alluvial cone of the San Joaquin would have its underground percolating water destroyed in event the physical solution proposed by the Court was not adopted.[26] The evidence in the case is that this valuable land was worth $1,000.00 per acre. This would mean a total damage to the lands in the alluvial cone of the

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[24]R. 1981, Testimony of Leland K. Hill, 14,980.

[25]1951-1952, 1952-1953, 1953-1954, 1954-1955, 1955-1956, 1956-1957, 1957-1958, 1958-1959, 1959-1960, U. S. Geological Survey, Water Supply Papers.

[26]R. 938, Amended Finding 26-A.

San Joaquin River $100,000,000.00. As will be discussed in a later chapter of this brief, should the respondents refuse to place the Court's plan of physical solution in operation and should this Court hold respondents could acquire these percolating water rights by either eminent domain or condemnation (as the lower Court erroneously stated they could do) this would cost the government alone for such a taking approximately $100,000,000.00 or over one-half the cost of the Central Valley Project. There would also be additional damage for the destruction of the municipally owned wells of the City of Fresno. It is submitted that the performance of the Court's decree of physical solution, costing less than $1,000,000.00 will not only save the government a very large sum of money, but would cut down the large flow of water the Bureau has had to release down the river since beginning operation of the Central Valley Project so that not only could the City of Fresno have the water they herein ask for, but no respondent district would have to take less water than their contract calls for.

The rights of the overlying landowners are considered analogous and equal to riparian rights and are therefore entitled to protection.[27]

(d) *The Trial Court's Findings on the Extent of Percolation Into the Alluvial Cone and Damage to the Lands on the Alluvial Cone Under the Bureau of Reclamation's Plan of Physical Solution Were Sustained by the Court Below.*

The Court below affirmed the decision of the District Court holding that the waters of the San Joaquin River

[27] *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935).

percolated throughout the alluvial cone of the San Joaquin prior to the construction of Friant Dam and that the 100,000 acres of land on said alluvial cone (valued at $100,000,000.00) would be irreparably damaged and completely destroyed if the Court's plan of physical solution were not adopted.

**6. The Record in This Case.**

The complete record in this case is 50,000 pages. The trial before the District Court took nineteen months of continuous trial and two additional trial periods and the decision of the District Court involves 263 separate rulings—the largest number of points ever decided in a single case according to West's Publishing Company. The parties printed the material portion of the record but not all of the record in order to economize. The trial judge was dissatisfied with the record as printed and on the 31st day of March, 1959, in accordance with Rule 75(i), Federal Rules of Civil Procedure, ordered the entire remaining unprinted record to be made a part of the record and shipped it to the Ninth Circuit Court of Appeals. The Department of Justice appealed the District Court's order but did not perfect their appeal and therefore the District Judge's order became final. The unprinted portion of the record was generously quoted from by all parties before the Ninth Circuit. The entire record has been shipped to this Court by the Ninth Circuit Court of Appeals in accordance with the ruling of the District Judge. We would assume that the entire record could be referred to by any party in accordance with Rule 75(i). However, by stipulation dated June 26, 1962, signed by the United States and the undersigned and filed with this Court it was also provided

"that reference may be made by the parties in their brief and at argument to any unprinted portions of the certified record."

Due to the extreme length of the record, the many points of law unsolved and the complexity of the Central Valley Project we ask the Court's indulgence on the length of our brief.

### 7. The Era of Richard Boke.

Everything was going fine with the construction and operation of the Central Valley Project under the same great engineers of the Bureau who had constructed Hoover Dam, Bonneville Dam and the other great reclamation projects. The City of Fresno was relying on the promises of these outstanding men and the acts of Congress guaranteeing them water from the Central Valley Project. Then shortly after the first water was delivered under the Central Valley Project in 1944, to the City's great dismay, two incompetent and inexperienced men, who were not engineers nor administrators, were installed as Chief of the Bureau of Reclamation and Regional Director of the Central Valley Project in California, and captured control of the great Bureau of Reclamation. Boke was given exclusive power of executing the contracts and water releases in the Central Valley Project without necessity of contacting his superiors in any way.[28] These men,

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[28]"Q. Mr. Boke, what is your official position with the United States Bureau of Reclamation? A. Regional Director, Bureau of Reclamation, for Region 2 Sacramento.

* * *.

Q. Well, as far as the Bureau of Reclamation is concerned, and excluding flood control operations, have you full authority yourself to make any releases in the Central Valley Plan in California, at Friant or Shasta, as you deem necessary?

* * *."

in violation of the original Feasibility Report covering the Central Valley Project and in violation of every act of Congress and the interpretations thereof by the federal courts, shortly after their appointment, began a consistent refusal to recognize rights of the City of Fresno to the water it was entitled to under the Central Valley Project as approved by Congress. In our discussion of Boke and Strauss we are not attacking these men personally, but simply want to point out that they were too inexperienced and unqualified to even begin to handle their respective jobs or to appreciate the magnificent group of engineers they headed, nor could they understand the will of Congress in regard to the Central Valley Project.

Immediately upon his employment as Chief of the Bureau of Reclamation, Strauss, at Boke's insistence, asked most of the great engineers of the Bureau of Reclamation, like Bashore who had constructed the Central Valley Project, and other great engineers of

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The Court: What he is trying to get at is, the long and the short of it, every time you change the flow of Friant Dam here, you don't have to get the consent of the Secretary of the Interior?
The Witness: That is correct.
The Court: Or Mr. Strauss, the head of the Bureau?
The Witness: Not at all.
The Court: That determination is made here?
The Witness: Yes.

Q. (By Mr. Rowe): You remember having lunch in Washington on April 17, with Mr. Winton, sitting in the back of the room, and Mr. Earl Harris of Santa Cruz, do you not? A. Certainly.

Q. You made a statement at that time that you could do whatever you wanted in California, as far as contracting for water, setting up flows, and releasing water from a dam, didn't you? A. That is generally my responsibility, yes.

Q. Yes, without appealing to any higher authority? A. Generally speaking, yes."

Testimony of Richard L. Boke, Rep. Tr. 599, 600.

the Bureau of Reclamation, who had constructed Hoover and Bonneville Dams, to get out.[29]

Boke, the Regional Director of the Bureau of Reclamation for California, was not an engineer and a Congressional committee found that he did not have the qualification to administer the Central Valley Project.[30]

The old Bureau Engineers who had successfully designed and constructed the Central Valley Project, Boulder Dam and the other great reclamation projects testified under oath that Boke and Strauss had completely wrecked the Bureau's great staff.[31]

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[29]"Mr. Hodson. Yes; there has been a very quiet but nonetheless bitter controversy raging within the Bureau ever since * * * between the so-called old-time career Bureau people and on their ideas of what the Bureau is supposed to be doing, and the new group which has taken over control and management of the Bureau * * * Mr. Comstock talked to Mr. Bashore in Denver. He said that he was called into the office and given his choice to retire or be *kicked out*—so he retired—and the reasons were he would not go along on this new thinking and these new plans that the Bureau was putting into effect." (emphasis ours)

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 746.

[30]"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 10 (August 4, 1948).

[31]"Mr. Blanks * * *. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. That engineering organization under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked. * * *."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 699.

Strauss, Chief of the Bureau of Reclamation, was equally criticized by Congress.[32]

While the City of Fresno was attempting to get the water to which it was entitled from the Central Valley Project under the acts of Congress, Strauss, himself, due to their continual violation of the mandates of Congress, admitted that Congress no longer trusted either him, Boke, nor the Secretary of the Interior.[33]

When Boke took over, he had an argument with some Fresno County officials. Thereafter he refused to act on any application from anyone in the County of Fresno, including the City of Fresno, for water from the Central Valley Project and illegally began the deliberate exclusion of the City of Fresno and the County of Fresno from the service area of the Central Valley Project and from any benefits from the Central Valley Project in direct violation of the will of Congress and the laws and statutes of the State of California.

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[32]Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: "Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the idealogist who lives by the manipulation of propaganda, freely dispatched at public cost; * * *."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 140.

[33]"At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *.'"

Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept., August 7, 1948, House Report No. 2458, pp. 555-556.

Acting under the illegal recommendations of Boke, the then Acting Secretary of the Interior, Chapman, at the insistence of Boke, illegally and without authority of Congress, blandly announced in a letter dated February 24, 1947, that he was taking from the San Joaquin River between Friant Dam and Gravelly Ford Canal, a large portion of this vitally needed water from Fresno City and County, which water, under the original Feasibility Report of President Roosevelt, approved by Congress was only to be used as a supplemental supply, for municipalities and presently irrigated land *to illegally supply an additional 338,000 acres of dry, uncultivated and unirrigated land not intended to be supplied by water from the Central Valley Project under the original Feasibility Report nor by the acts of Congress authorizing and reauthorizing the project.*[34]

Boke consistently refused to consider applications of San Joaquin Valley cities including the City of Fresno for municipal water out of the Central Valley Project and refused to make the customary investigation reports upon which a contract could be based. As a result of Boke's illegally giving water to uncultivated lands in the San Joaquin Valley which were to receive no water from the Central Valley Project under the Feasibility Report of December 2, 1935, which is the basis of the Central Valley Project, and as a result of his refusal to give water to cities of the San Joaquin Valley, the Bureau of Reclamation is now proposing to spend $714,162,000.00 in an effort to bring in an additional supply of water to the *cultivated* lands which were legally entitled to the Central Valley

[34]"Millerton Lake will also provide 1,256,500 acre-feet (Class I and II) to the upper (southern) San Joaquin Valley as a supply for approximately *338,000 acres of presently dry land* * * *." (emphasis ours)
R. 309 (New Volume), Pltf. Ex. 136, 6570.

Project water which had been denied sufficient water by the illegal action of Boke. This new costly project if ever adopted would have a duplicate canal running alongside the present Friant-Kern Canal to furnish a supplemental water supply to the farms and cities illegally excluded by Boke from the Central Valley Project.[35]

Boke thereafter negotiated and signed contracts with fifteen appellant irrigation and water districts[36] in an abortive attempt to use up all of the water of the Central Valley Project and thus *illegally exclude the City and County of Fresno* from obtaining the supply of vitally needed water to which they were entitled under the acts of Congress.

In July of 1951 after the original Central Valley Project had been completed, Boke, in spite of his con-

[35] "The capital cost of the Government-constructed features including $23,540,000 for enlargement of the Folsom-South Canal is estimated to be $714,162,000. The distribution features will cost an additional $181,450,000."

East Side Division, Central Valley Project, California, "A Report on the Feasibility of Water Supply Development", United States Department of the Interior, Bureau of Reclamation, January, 1962, page 48.

[36] "

| Districts | Date of Contract with Bureau |
|---|---|
| Delano-Earlimart | 8/11/51 |
| Exeter | 11/8/50 |
| Ivanhoe | 9/23/50 |
| Lindmore | 2/29/49 |
| Lindsay-Strathmore | 8/5/48 |
| Lower Tule | 5/1/51 |
| Orange Cove | 5/20/49 |
| Porterville | 1/28/52 |
| Sausalito | 2/13/51 |
| S.S.J.M.U.D. | 10/18/45 |
| Stone Corrall | 12/13/50 |
| Terra Bella | 10/12/50 |
| Tulare | 10/18/50 |
| Chowchilla | 7/5/50 |
| Madera | 5/14/51" |

*Rank v. (Krug) United States*, 142 F. Supp. 1, 137 (1956).

tinued representations to Congress[37] and to the farmers along the river between Friant Dam and Gravelly Ford Canal, carried out his threats to dry up the river below Friant Dam and dried up many of the main channels of the San Joaquin River between Friant Dam and Gravelly Ford Canal along which the named plaintiffs' lands were located as shown by the following picture of J. E. Cobb, one of the named plaintiffs (Exhibit III of this brief), [Pltf. Ex. 148, Rep. Tr. 6012] in the dry river bed.

**EXHIBIT III.**

**Plaintiff J. E. Cobb in dry river bed after Boke dried the river.**

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[37] "*There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool,* water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284, Pltf. Ex. 121, Testimony of U.S.B.R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate, 80th Congress, 1st Session on S-912, p. 708, Rep. Tr. 3072.

The named plaintiffs on July 26, 1951, asked the District Court for a temporary injunction to restrain Boke from illegally drying up the river.

After hearing on this motion for a temporary injunction, the District Court on August 29, 1951, entered a consent restraining order[38] *with the consent of all parties*, including the attorney for the United States Department of Justice representing the respondent Bureau of Reclamation officials.[39] These orders restrained the impounding of water by defendants unless sufficient water was allowed by respondent officials to flow down the San Joaquin River to supply the needs of the plaintiffs. They were complied with by all parties until the government revoked its consent and the court below sustained such revocation. However, in spite of this revocation, respondent officials have continued to let water run down the river to Gravelly Ford Canal. This consent decree will be further discussed in a subsequent sub-chapter of this brief under the heading "History of Litigation."

A picture of Mr. Cobb (Exhibit IV of this brief) [Pltf. Ex. 149, Rep. Tr. 6612] standing in the same place in the river after the consent restraining order of August 29, 1951, follows:

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[38]This order also required the installation of automatic water level recorders on 25 or more wells in the alluvial cone, the location of which were to be selected by agreement among the experts of the parties. This was done, and the results were introduced in evidence.

[39]"* * * the plaintiffs and defendant officials of the United States and the State of California having consented, and no other parties having objected to the entry of this order * * *."

Temporary Restraining Order of August 29, 1951, signed by District Judge Pierson M. Hall.

EXHBIT IV.

Mr. Cobb after consent decree of August 29, 1951.

## B. Legislative History of the Central Valley Project.

### 1. The Central Valley Project Was First Authorized as a State of California Undertaking.

The Central Valley Project was first authorized as a State of California undertaking by the Legislature in 1933, (Cal. Stats. 1933, 1042) ratified by a vote of

the people and became effective January 13, 1934. It is now codified as part of the California Water Code.[40]

The Central Valley Plan of the State is set out in Report No. 3 of the California Water Project Authority of the State of California.

As heretofore stated, this report expressly provides that the water to be taken from the San Joaquin River for diversion through Friant-Kern Canal and Madera Canal covered only those water rights of the owners below Gravelly Ford Canal and upstream from the Merced River.[41]

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[40]"The Central Valley Project was authorized as a state undertaking in the enactment of the Legislature of the Central Valley Project Act of 1933 (Stats. 1933, Ch. 1042), and the subsequent approval of the act by the electors, on referendum, at a special state-wide election. The act became effective January 13, 1934, and is now codified as Division 6, Part 3 of the Water Code. The act authorized and adopted the Central Valley Project for construction as a state project, created the Water Project Authority to construct, operate and administer the project, and authorized the financing thereof by issuance of revenue bonds in the maximum amount of $170,000,000."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 18.

[41]"Definition of Rights to the Waters of the San Joaquin River Proposed For Diversion to Upper San Joaquin Valley:

"Introduction: This report presents a definition of the rights to San Joaquin River water which it is assumed appertain to lands receiving water from the river between the Gravelly Ford Canal and Merced River. Under the Central Valley Project, it is proposed to acquire (by purchase, exchange, and appropriation) the right to utilize the waters of the San Joaquin River inhering in these rights, * * *."

Pltf. Ex. 410, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley", Charles H. Lee, Consulting Engineer, August, 1936, Water Project Authority. State of California, Page 1, Rep. Tr. 23,206.

(a) *The Central Valley Project as Authorized by the People and Legislature of the State of California Specifically Provided that Domestic Use of Water was a Primary Purpose of the Project.*

"*Purposes.* Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and *domestic* use, and secondarily for the generation of electric power and other beneficial uses. (p. 1896.)" (emphasis ours)

California Water Code, Section 11226.

*Primary purposes.* Shasta Dam shall be constructed and used primarily for the following purposes:

"* * *.

"(d) Storage and stabilization of the water supply of the Sacramento River for irrigation and *domestic use.*" (emphasis ours)

California Water Code, Section 11207.

(b) *Due to Inability to Finance the Project the State of California Applied to the Federal Government to Take Over the Construction of California's Central Valley Project as a Federal United States Bureau of Reclamation Project.*

At the 1935 session of Congress California's congressional representatives asked that Congress authorize and finance the Central Valley Project.[42]

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[42]"At the 1935 Session of the Congress, California's congressional representatives introduced legislation to provide for federal authorization and financing of the Central Valley Project."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 19.

**2. The Central Valley Project Was Taken Over by the United States in the Year 1935 and Reauthorized by Congress as a Reclamation Project in 1937.**

The Central Valley Project was first authorized as a federal project under the Emergency Relief Appropriation Act of August 30, 1935, 49 Stat. 1028-1038,[43] in accordance with the following statutory procedure.

Section 4 of the Act of Congress of December 5, 1924, 43 Stat. 672, 702, provides that no reclamation project should be constructed under the Basic Reclamation Act of June 17, 1902 (32 Stat. 388), until the reclamation project had been set forth in detail in a feasibility report.

> "Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineer-

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[43]"A proposal was presented to the Secretary of the Interior and the President of the United States, providing for the construction of the Central Valley Project as a federal reclamation project, funds to be provided for construction from those available under the Emergency Relief Appropriation Act of 1935 (49 Stat. 1028, 1038). This proposal was approved and on September 10, 1935, the President allocated $20,000,000 to start construction on the project, with the Bureau of Reclamation as the construction agency. The executive order stipulated that the funds should be used for Friant Reservoir and certain other facilities to be chosen, the combined cost of which was not to exceed $20,000,000. The order also provided that the funds were to be reimbursable in accordance with the reclamation laws, which by precedent was interpreted to mean that repayment contracts would be required before construction could begin. The order was subsequently modified on November 16, 1935, making $15,000,000 available for the project, permitting construction on any of its units and waiving the execution of repayment contracts prior to beginning of construction."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 19.

ing features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes and that it will probably return the cost thereof to the United States."

Act of December 5, 1924, 43 Stat. 672, 702.

Pursuant to said Act of December 5, 1924, hereinabove referred to, and the request of the State of California, Secretary Ickes approved and submitted to President Roosevelt the Feasibility Report on the Central Valley Project and on December 2, 1935, President Roosevelt officially approved the same, thereby determining the basic features of the Central Valley Project.[44] The Feasibility Report dated December 2, 1935, is set forth in Appendix "D" of this brief, page 20. This Feasibility Report is also found in Appendix "C" in *Rank v. Krug,* 90 F. Supp. 773, 823 (1950). Congress authorized the original California Central Valley Project as set forth in the Feasibility Report signed by President Roosevelt on December 2, 1935.

The Central Valley Project was again reauthorized as a reclamation project by the Act of August 26, 1937, 50 Stat. 844, 850, which specificially provided that the project should be for irrigation and *DOMESTIC* purposes.[45]

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[44]"On December 2, 1935, the President also approved a report of the Secretary of the Interior, dated November 26, 1935, declaring the project to be feasible from engineering, agricultural, and financial standpoints, approving and recommending its construction, and recommending the project as a federal reclamation enterprise."

Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California", Earl Warren, Governor, March, 1952, page 19.

[45]See Appendix "D."

This Court has held that the Feasibility Report by the President dated December 2, 1935, is the basis and continued to be the basis of the Central Valley Project as authorized and reauthorized by Congress.

> "But it also is true, as pointed out by claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."
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> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

**3. The Central Valley Project as a Bureau of Reclamation Project.**

(a) *The Basic Reclamation Act of June 17, 1902.*

The Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 390, provided as follows:

> "Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the*

*Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (emphasis ours)

Act of June 17, 1902, 32 Stat. 388, 390 (43 U. S. C. 391).

Section 8 of the Basic Reclamation Act of June 17, 1902, was again repassed by Congress in 1956 as part of the Central Valley Project laws.[46]

(b) *The Central Valley Project Provided Water for the Counties of Merced, Madera, Fresno, Kings and Kern, Including the City of Fresno.*

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[46]"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of wated used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

"Approved July 2, 1956."

Act of July 2, 1956, 70 Stat. 483, 484.

The Feasibility Report specifically provided that the water from Friant Dam, one of the principal features of the Central Valley Project, was to serve "DEVELOPED LANDS" in the counties of Merced, Madera, *Fresno*, Tulare, Kings, and Kern, including the City of Fresno.[47]

(c) *No New Agricultural Lands Were to be Brought into Cultivation.*

"The project is *not* designed for bringing new lands into cultivation, but for the maintenance of *existing* agricultural development and existing civilization of a high type." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

"The economic values of the project are of great magnitude. *The project will not bring into*

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[47] "Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve *developed* irrigated lands in an area extending from Madera County on the north to Kern County on the south." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

"Prior to December 2, 1935, the defendant through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno*, Tulare, Kings, and Kern in the State of California." (emphasis ours)

*Gerlach Live Stock Co. v. United States*, 111 C. Cls. 1 at 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"7. The plan as formulated by defendant involved the irrigation of a large area of privately owned land nonriparian to the river situated both to the north and south of Friant in the California counties of *Madera, Merced, Fresno, Tulare, Kings and Kern*." (emphasis ours)

*Wolfsen v. United States*, 162 F. Supp. 403 (1958).

*production new agricultural areas* but will maintain present values and civilization."

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

(d) *The Central Valley Project Provided Water for Domestic and Municipal Uses.*

(aa) The Feasibility Report of December 2, 1935, Upon Which the Central Valley Project Act is Based, Also Provided That the Central Valley Project Was to Furnish Water for Domestic, Industrial and Municipal Purposes.

"The Central Valley Project embodies a plan * * * to provide urgently needed water supplies for existing * * * *industrial and municipal* developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region * * *." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" hereof.

(bb) Congress Specifically Provided That the Central Valley Project Should Furnish Water for Domestic and Municipal Uses.

Congress, by the Act of April 16, 1906, specifically authorized the furnishing of municipal water from reclamation projects to cities within the immediate vicinity of any reclamation project and specifically provided that rates for municipal water should not be lower than that charged for agricultural water, clearly

indicating that Congress did not intend that cities pay more for water.[48]

Fresno lies within a few miles of Friant Dam and the Friant-Kern Canal. It is clearly within the immediate vicinity of the Central Valley Project.

The Act of August 26, 1937, 50 Stat. 844-850, reauthorizing the Central Valley Project as a reclamation project expressly provided that the Central Valley Project should furnish water for *domestic* use.

> "* * * that the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for *irrigation and domestic uses;* and third, for power." (emphasis ours)
>
> Act of August 26, 1937, 50 Stat. 844, 850

Other acts followed specifically recognizing that the Central Valley Project was for and reauthorized for *domestic* and *municipal* purposes. Among these acts is Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1187, 1194,[49] which

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[48] "Sec. 4. That the Secretary of the Interior shall * * * *and may enter into contract with the proper authorities of * * * towns or cities on or in the immediate vicinity of irrigation projects,* which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of *charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.*" (emphasis ours)
Act of April 16, 1906, 34 Stat. 116-117.

[49] "(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided,* That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding

specifically provides that the Secretary of the Interior is authorized to enter into contracts with municipalities for a municipal water supply providing for a return of construction costs only in forty years with the Secretary to have the power at his option to charge interest at a rate not to exceed 3½ per cent per annum or that he may enter into a sale contract for water to municipalities for periods not to exceed forty years at rates sufficient to at least cover a *proportionate* share of the construction costs, annual operation and maintenance costs and a proportionate share of the fixed charges. This is also the ruling of this Court.[50]

(cc) This Court Has Also Found That the Central Valley Project Was to Furnish Water for Domestic and Municipal Purposes.

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (emphasis ours)

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

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the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an *appropriate share* as determined by the Secretary of that part of the *construction* costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an *appropriate share of the annual operation* and maintenance cost *and an appropriate share of such fixed charges as the Secretary deems proper*, and shall require the payment of said rates each year in advance of delivery of water for said year."

Act of August 4, 1939, 53 Stat. 1187, 1194.

[50] "* * *. This project anticipates recoupment of its cost over a forty-year period."

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 752-753, 70 S. Ct. 955, 969, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest the flow and regulation its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes." (emphasis ours)

*Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 281; 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

(dd) Rulings of California Administrative Agencies.

The California Administrative Agency empowered to grant permits to appropriate water of the San Joaquin has held appellant City of Fresno is in the service area of the Central Valley project.

"Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."

State of California, State Water Rights Board, Decision No. D 935, Adopted June 2, 1959, p. 68.

(e) *The Central Valley Project Also Provided Water for the Reparian and Percolating Water Users Along the 38-Mile Stretch of the San Joaquin River Between Friant Dam and Gravelly Ford Canal.*

Appellant City of Fresno's interest in the 38-mile stretch of lands between Friant Dam and Gravelly Ford Canal is because the City of Fresno obtains a large part of its municipal water supply from the San

Joaquin River waters percolating into the alluvial cone[51] of the San Joaquin River upon which are located many wells of the City of Fresno's municipal water department—percolating waters from a stream under California laws having the same or analogous rights to riparian rights (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935)) and because the City is a named plaintiff in this action along with other named plaintiffs, it represents as a class action those owners between Friant Dam and Gravelly Ford Canal and the other landowners on the alluvial cone of the San Joaquin.

The United States Bureau of Reclamation's take-over of the Central Valley Project always provided water to satisfy the riparian and percolating water rights between Friant Dam and Gravelly Ford Canal, a point 38 miles downstream on the San Joaquin River from Friant Dam.

> "9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant * * *:[52] *to satisfy riparian rights between Friant and Gravelly Ford;* * * *." (emphasis ours)
>
> *Wolfsen v. United States*, 162 F. Supp. 403, 410 (1958).

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[51]The alluvial cone of the San Joaquin is shown as the area within Lee's Line on Exhibit 2 of this brief.

[52]"Senator Downey: What Unit is this? Is this Millerton Reservoir?

"Mr. Stoner: This is just Millerton now. Finally, in order to determine from the above a definite figure for the project irrigation supply in the southern San Joaquin Valley, considera-

The Bureau of Reclamation always represented to Congress and to the plaintiff landowners between Friant Dam and Gravelly Ford Canal that there would always be water for their riparian and percolating water rights under the Central Valley Project.[53]

As stated the Bureau officials also publicly represented to the landowners between Friant Dam and Gravelly Ford Canal that they were to receive as much or more water after the construction of Friant Dam than they had received before.[54] This Court also found

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tion must be given to the water commitments downstream on the San Joaquin River, and to evaporation and seepage losses.

*"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool,* water needed for preservation of fish life and waterfowl and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284 Pltf. Ex. 121, Testimony of U. S. B. R. Boke's Engineer Stoner on Hearings before a Sub-committee of the Committee on Public Lands United States Senate, 80th Congress, 1st Session on S-912; page 708, Rep. Tr. 3072.

[53]R. 295 (New Volume), Deft. Ex. A-79-A, 21,975.

[54]"Kelly and Webb declared they are positive no such situation will arise; that the Central Valleys Project will be completed as a whole; *that no present owner of water rights in the San Joaquin will be deprived of any water* and that the California Water Authority will guard zealously the rights of all property owner." (emphasis ours)

R. 332, Pltf. Ex. 161, Excerpt from article from Fresno Bee dated February 5, 1937.

"By Mr. Rowe: Q: Prior to the construction of Friant Dam, did you attend any meetings with some of the irrigation districts in the south part of the valley, and state officials and Bureau of Reclamation officials?

"A: Yes, a good many meetings. * * *

"* * *

"The Witness: Well, at Sacramento we met with Mr. Young, Hyatt was for the State, Van Etten and Edmundson, Mr. Kelly was the Department of Public Works, I believe, and Mr. Webb was the Attorney General at the time, U. S. Webb, I believe it was.

"* * *

that the Feasibility Report dated December 2, 1935, is the basis of congressional legislation approving the Central Valley Project as a federal reclamation project.[55] As will be shown later in our discussion of the law the contention of opposing counsel that the riparian and percolating water rights of the plaintiffs in the 38-mile stretch of the San Joaquin River between Friant Dam and Gravelly Ford Canal have been taken by either eminent domain or condemnation is entirely unfounded, unsubstantiated by any public document, Act of Congress or decision of the federal courts and is wholly a creature of the imagination of opposing counsel.

(f) *The Central Valley Project Provided for the Substitution of Sacramento River Waters Through the Delta-Mendota Canal for All Crop Lands Served Out of the Mendota Pool Including Tranquillity Irrigation District and the Old Miller and Lux Interests.*

"* * * the plan as originally adopted and as carried out by the Bureau included replacement * * *

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"Q: Well, what did Mr. Young and Mr. Kelly tell you?

"* * *

"The Witness: We were told we would have a large flow of well-regulated water; that the Government wouldn't take something away from one farmer and give it to another; and they told us always they were taking nothing but the overflow flood water, and we had the best water rights in the country, and they would protect them."

Testimony of Witness J. E. Cobb, Rep. Tr. 6630 to 6632.

[55]"A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 732, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

of all water *formerly used for crops* * * *. (emphasis ours)

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"Delta-Mendota Canal will carry surplus Sacramento River water 120 miles southerly from the Delta to *Mendota Pool* on San Joaquin River. Here the water will be used to meet the demands of *crop lands* now irrigated by diversions from San Joaquin River." (emphasis ours)

R. 326 (New volume), "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Report No. 2-4.0-3, November, 1945, page 7.

"1. Water rights appertaining to crop lands irrigated by controlled diversions, the right of utilization of the water inhering in which it is proposed to acquire by exchange for a substitutional water supply furnished by and through the San Joaquin Pumping System of the Central Valley Project."

Pltf. Ex. 410, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley". August, 1936, page 1, Rep. Tr. 23,206.

(g) *Only Uncontrolled Grasslands Water Flowing Over the Lands Onto Uncultivated Pasture Lands at High Water or Flood Flow Was to Be Taken by Eminent Domain.*

The uncontrolled flows of the San Joaquin River during high flows of the river over its backs, commonly called uncontrolled grassland water, were to be taken by condemnation or eminent domain.[56]

**4. Water Rights of Tranquillity Irrigation District.**

Tranquillity Irrigation District is one of the oldest irrigation districts in the state. Incorporated in 1917 it has a gross area of 10,750 acres and a net irrigable area of 9,076 acres and is located 30 miles west of Fresno. The District is bounded on its north and east sides by Fresno Slough, an arm of bay of the San Joaquin River[57] which is also a part of Mendota Pool.

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[56]"3. Rights to uncontrolled flow which it is proposed to acquire by appropriation or, where necessary or proper, by compensating such interests (assumedly chiefly owners of riparian lands subject to overflow) as may prove to have valid claims thereto, or by both such methods."

Pltf. Ex. 410, page 1, Report No. 3, "Definition of Rights to the Waters of the San Joaquin River Proposed for Diversion to Upper San Joaquin Valley", Charles H. Lee, Consulting Engineer, August, 1936, Rep. Tr. 23,206.

"Uncontrolled grass lands involved in the claims are parts of a large riparian area which benefits from the natural seasonal overflow of the stream. * * *. Their claim of right is, in other words, to enjoy natural, seasonal fluctuation unhindered, which presupposes a peak flow largely unutilized.

"The project puts an end to all this. * * *. Unlike the supply utilized for nearby crop and 'controlled' lands, the vanishing San Joaquin inundation cannot be replaced with Sacramento water. Claimants have been severally awarded compensation for this taking of their annual inundations, * * *."

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 730, 70 S. Ct. 955, 958, 94 L. Ed. 1231 (1950).

[57]*Miller & Lux v. Enterprise Canal, etc., Co.*, 169 C. 415, 147 P. 567 (1915).

Most of the following described rights of Appellee Tranquillity Irrigation District are riparian rights. It also has a small amount of prescriptive rights which are recognized by the Bureau of Reclamation and will not be treated separately in this brief.

By old court decrees Tranquillity Irrigation District was decreed 12% in excess of 1360 second feet of the natural flow of water of the San Joaquin River entering Mendota Pool. This right was recognized by contract between the district and Miller & Lux and its subsidiary companies,[58] which the Bureau of Reclamation admittedly assumed. The trial court again decreed Tranquillity Irrigation District its long recognized right to 12% of all water above 1360 acre feet of the natural flow of the San Joaquin entering Mendota Pool in accordance with the formula for determining the same used by the Bureau of Reclamation at the time of the trial in the District Court,[59] and *which formula has been continually and successfully used by the Bureau of Reclamation and Tranquillity Irrigation District without friction or objection since the close of the trial* before the lower court in December of 1954.

The lower court gave the United States the right to substitute an equal amount of waters from the Delta-Mendota Canal (which empties into Mendota Pool from which Tranquillity Irrigation District pumps its riparian water) for the natural flow of the San Joaquin to which finding no one has objected. That the Bureau of Reclamation must replace at its own expense and without deduction any waters taken from the Tran-

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[58]R. 2300-2306, Pltf. Ex. 271, 21,963.

[59]R. 2307-2308, Pltf. Ex. 409-A, 23,199.

quillity Irrigation District, clearly appears from the following statement of this court in *United States v. Gerlach Live Stock Co., supra.*

> "* * * the plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for crops and 'controlled grasslands', * * * (emphasis ours)
>
> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

> "*Delta-Mendota Canal* will carry surplus Sacramento River water 120 miles southerly from the Delta to *Mendota Pool* on San Joaquin River. Here the water will be used to meet the demand of crop lands now irrigated by diversions from *San Joaquin River.*" (emphasis ours)
>
> R. 326 (New Volume) "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," United States Department of the Interior, Harold L. Ickes, Secretary, Project Report No. 2-4.0-3, November, 1945, page 7.

At the hearing before the court below all counsel frankly stated there was *no argument* over the right of Tranquillity Irrigation District and that both the Bureau of Reclamation and Tranquillity Irrigation District were proceeding in accordance with the formula of the Bureau above mentioned.

> "1. Also intervening as plaintiff was the Tranquillity Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been re-

solved by agreement and no longer constitutes an issue upon appeal."

*State of California, United States of America v. Rank*, 293 F. 2d 340, 342 (1961). (Footnote 1)

## C. Law of California Water Rights Summarized.

An excellent summary of the law of California Water Rights appears in the Decision of the lower court in *Rank v. (Krug) United States*, 142 F. Supp. 1, 105, 121 (1956), however for the convenience of this Court we will here briefly summarize the important points of California water law involved in this case.

### 1. Domestic and Municipal Use of Water Have the Highest Priority in California and Are Entitled to Preference Above Irrigation Use.

Both the California Supreme Court and the California Legislature have approved the doctrine that domestic use of water takes precedence over every other use and that irrigation use is secondary to this use.[60] This is also the established policy of the Legislature[61]

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[60] "(9) Without question the authorities approve the use of water for domestic purposes as first entitled to preference. That use includes consumption for the sustenance of human beings, for household conveniences, and for the care of livestock.

*Prather v. Hoberg*, 24 C. 2d 549, 562, 150 P. 2d 405 (1944).

"(9) It should be the first concern of the court in any case pending before it and of the department in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream. *The highest use in accordance with the law is for domestic purposes, and the next highest use is for irrigation.*" (emphasis ours)

*Meridian, Ltd. v. San Francisco*, 13 C. 2d 424, 450, 90 P. 537, 91 P. 2d 105 (1939).

[61] "Sec. 106. *Highest Uses of Water; domestic; irrigation.* It is hereby declared to be the established policy of this State that

This priority of domestic and municipal water we submit is binding on the United States in its use of water under the Central Valley Project.[62]

**2. The California County of Origin and Watershed of Origin Protective Statutes.**

It is a fundamental rule and policy of both the California Legislature and the State of California Supreme Court that the counties and watersheds in which water originates shall have reversed to them sufficient *water* for their present and future needs before water

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the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Enacted 1943.)

California Water Code, Section 106.

"Sec. 1460. *Municipal Priority.* The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right irrespective of whether it is first in time." (Enacted 1943.)

California Water Code, Section 1460.

[62] "7. The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. Section 371 *et seq.*, 43 U. S. C. A. Section 371 *et seq.*, to which Congress adverted, applies only to the seventeen Western States. * * * *To the extent that* it is applicable this clearly leaves it to the State to say what rights of an appropriator, or riparian owner may subsist along with any federal right." (emphasis ours)

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 734, 70 S. Ct. 955, 960, 94 L. Ed. 1231 (1950).

"Sec. 38. *Preferred Uses.*—It has been declared by both the courts and the legislature to be the established policy of this state that use for domestic purposes is the highest use of water and that the next highest use is for irrigation. These preferred uses are made part of the policy of the state applicable to state boards in acting on applications to appropriate water under the Water Commission Act. And it is the policy of the state that the rights of municipalities to acquire and hold rights to the use of water for existing and future uses are to be protected to the fullest extent necessary. The general state policy set forth in these statutes declaring domestic and municipal uses to be the highest and best uses are propositions of substantive laws, binding on state officials charged with supervision of water appropriation, and on appropriators, including the United States."

51 Cal. Jur. 2d 498.

is exported out of the county and watershed of origin for use elsewhere and that damages may not be substituted for water.[63]

Moreover, Congress by the Act of October 14, 1949, 63 Stat. 852, 853, specifically required the Secretary of the Interior to proceed in accordance with county and watershed of origin laws in the operation of the Central Valley Project.[64]

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[63] "Central Valley Project.—In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originated, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom shall not be deprived by the authority directly or indirectly of the prior rights to all of the water reasonably required to adequately supply the beneficial needs of the watershed area or any of the inhabitants, or property owners therein."

California Stat. 1933, Chap. 1042 as amended by Calif. Stat. 1943, Chap. 368.

"* * * And a city furnishing water for domestic and municipal uses to its inhabitants, and being in the watershed and county of origin, is in a preferred position to either the *United States*, as an appropriator under the State Water Plan, or any irrigation or water district." (emphasis ours)

51 Cal. Jur. 2d 503;

*Miller v. Bay Cities Water Co.*, 157 C. 256, 107 P. 115, 27 L. R. A., N. S. 772 (1910).

"* * * Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive *areas such as the City of Fresno* and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. Rather, we believe that *the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 11128 and 'County of Origin' Sections 10500, 10504 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam, should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands.*" (emphasis ours)

State of California, State Water Rights Board Decision No. D 935, Adopted June 2, 1959.

[64] "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of

A further and more complete discussion of the California watershed and county of origin protective statutes will be made on the subsequent chapter in this brief entitled "The Lower Court Erred in Holding that Respondent Officials Could Take the Water Needed by Fresno City which Lies in Both the County and Watershed of Origin of the San Joaquin River by Either Eminent Domain or Condemnation."

### 3. Statutory Procedure to Appropriate Surplus Waters in California.

Since 1913 the only way to appropriate surplus water in California is to file an application to appropriate with the California Water Rights Board.

The California Water Commission Act as adopted in 1913, Cal. Stats. 1913, p. 1012, and as variously amended thereafter, was codified in 1943 as part of the California Water Code.

The portion of the Water Code relating to applications to appropriate water is Part 2 of Division 2 of the Water Code, Sections 1200 to 1801 inclusive.

The general scheme of Part 2 of Division 2 of the Water Code provides for the filing of an application to appropriate, the giving of a notice of hearing, the holding of a hearing, the granting of the permit, to be followed by construction of diversion works, and upon

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Congress of August 26, 1937 (50 Stat. 850), is hereby *reauthorized* * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 13, 1949, 63 Stat. 852, 853.

the completion of diversion works, to be followed by a license from the State of California. License is always made "subject to vested rights" which includes those of the named plaintiffs and the City of Fresno.

(a) *Change of Point of Diversion.*

No change of point of diversion of the appropriated waters of a California stream may be made without license from the California Water Rights Board and then only if "the change will not operate to the injury of any legal user of the water involved".

California Water Code, Secs. 1701, 1702.

**4. Rights of Riparian Owners, Appropriative and Prescriptive Owners Before the 1928 California Amendment to the Constitution.**

Some states follow the law of riparian water rights. Other states follow the law of appropriative water rights. Until 1928, California followed a mixture of both appropriative and riparian water rights. A concise statement of the law of California water rights is set forth by this Court in *Gerlach Live Stock Co. v. United States,* 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950), and by the District Judge in this case in *Rank v. (Krug) United States,* 142 F. Supp. 1, 115-130 (1956).

Prior to 1928 in California a riparian owner could claim the full flow of the river past his property irrespective of whether he could put the flow to beneficial use. *Herminghaus v. Southern California Edison Company,* 200 C. 81, 252 P. 607 (1926); *Miller v. Bay Cities Water Co.,* 157 C. 256, 107 P. 115, 27 L. R. A., N. S. 772 (1910). The Central Valley Project could not have been built under such a law as set forth in these decisions.

### 5. Rights of Overlying Landowners to Underground Water Percolating From Streams.

In California the owners of lands overlying percolating water stratas fed from a stream have the same right to continued seepage from the stream as a riparian owner.[65]

The San Joaquin River in the state of nature before restricted by Friant Dam had percolated 211,000 acre-feet of water annually into the percolating water stratas underlying the 265,000 acres of the San Joaquin River alluvial cone between Friant Dam and Mendota Pool.[66]

The boundary of the alluvial cone of the San Joaquin River is shown and designated as "Lee's Line" on Exhibit II of this brief and the City of Fresno's Municipal Water Department has a large number of wells on the San Joaquin alluvial cone which pump a large amount of San Joaquin River waters which percolate from the San Joaquin River into the underground stratas underlying the City of Fresno and thence into the wells supplying the domestic and municipal needs of the City of Fresno.

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[65] "* * * Rights to the use of underground waters, whether flowing, stored or percolating, by the overlying owner or appropriator are analogous and equal to riparian rights against subsequent claimants and are part and parcel of the land and as such are real property."

*Rank v. Krug*, 90 F. Supp. 773 at 787 (1950).

"7. * * * an overlying owner, * * * in this state cited with approval by this Court in *Gerlach Live Stock Co. v. United States, supra*, has been held to have analogous rights to those of a riparian. (*Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (74 Pac. 766, 99 Am. St. Rep. 35, 64 L. R. A. 236); Burr v. Maclay Rancho Co., 154 Cal. 428 (98 Pac. 260).)"

*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 525-526 (1935).

[66] R. 1992, Testimony of Witness Harry Barnes, Engineer for the Bureau of Reclamation, Rep. Tr. 16,974.

### 6. Rights to Water After the 1928 Constitutional Amendment.

In 1928 in order to make the Central Valley Project a reality and to avoid the effect of *Herminghaus v. Southern California Edison Company, supra,* the people of the State of California amended the California Constitution (Art. XIV, Sec. 3, see page 31 of Appendix to this brief). Under this amendment the right of a California riparian owner was limited to that amount of water flowing past his riparian land which he could beneficially use by reasonable methods of diversion.

### 7. The California Doctrine of Physical Solution.

By reason of said 1928 Constitutional Amendment, California courts, in order to conserve water and to assist appropriators of water such as the United States under the Central Valley Project and to make more water available to the United States, were not only empowered, but it became their duty, to make a "physical solution" of the water rights of both riparian and appropriative owners, so that "no drop would waste uselessly into the Pacific". *People of State of California v. United States,* 235 F. 2d 647 at 662 (9th Cir.) (1956). IN OTHER WORDS, A PHYSICAL SOLUTION WAS ADOPTED BY THE CALIFORNIA COURTS NOT TO AID THOSE LIKE THE ORIGINAL PLAINTIFFS BUT TO AID APPROPRIATORS LIKE THE UNITED STATES.

> "* * *. Since the 1928 amendment of section 3 of article XIV of the Constitution, it is not only within the power, but it is the duty, of the trial court to admit evidence relating to possible physical solutions in such a case, and if none of them is satisfactory to it to suggest on its own motion

such a physical solution and to enforce the same regardless of whether the parties agree; * * *."

*City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 318, 60 P. 2d 439 (1936).

In this discussion of the effect of the 1928 amendment we are simply summarizing the law. We agree with the Court below that the District Court's physical solution was proper and are not appealing from this part of the decision of the Court below. *State v. Rank*, 293 F. 2d 340, 344 (1950).

(a) *All Parties Requested That the District Court Make a Physical Solution.*

Before discussing what a physical solution is, it might be well to point out that as stated in our subchapter of this brief entitled "History of Litigation" (page 73 of this brief) all parties including the State of California, respondent officials of the Bureau of Reclamation, the respondent irrigation districts, the original plaintiffs, and appellant City of Fresno REQUESTED THAT THE DISTRICT COURT MAKE A PHYSICAL SOLUTION IN THIS CASE thus admitting that a physical solution was not only possible but legally proper. Even the Secretary of the Interior asked for a physical solution in this case. We quote from Secretary of Interior Douglas McKay's letter dated March 30, 1953:

> *"Plans for a physical solution. The State of California, as intervener, the plaintiffs, and the defendant officials of the United States have filed plans for a physical solution in Rank v. Krug.* The plans filed by the State of California and the defendant officials are substantially identical and have been stated to be so by representatives of the state.
>
> "* * *.

"We recommend that you affirm the principle of this plan for a physical solution, with the understanding that in the details of its execution it will be reconciled in so far as practicable with the plan filed by the State of California, and that you so inform the Attorney General." (emphasis ours)

R. 295, Deft. Ex. A-79-A, Signed: Douglas McKay, Secretary of the Interior, Rep. Tr. 21,975.

(b) *What is a Physical Solution.*

A physical solution has been well described by the Court below as follows:

"'The matter of a physical solution becomes a practical problem which will vary with each case. That practical problem is best stated by the question — how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights If those prior vested water rights can be preserved and satisfied *by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics, then, under the California decisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes.* The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction requiring a physical solution have been to, as near as possible, satisfy the prior vested right whether riparian or *overlying*,

and at the same time make available, for appropriation and reasonable and beneficial use elsewhere, all water in excess of that required to satisfy those prior vested rights.' " (emphasis ours)

*State v. Rank*, 293 F. 2d 340, 344 (1961).

(c) *THIS COURT and Other Federal Courts Including the Court Below Have Approved the Doctrine of a Physical Solution Many Times.*

*This Court* in affirming the decision of the United States Court of Claims involving the uses of the water of the San Joaquin River under California's Central Valley Project approved the principle of a decree of physical solution.

"* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory that he find some physical solution,* at his expense, to preserve existing prior rights, * * *." (emphasis ours)

*Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, Aff. 330 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

By affirming this case this Court clearly approved the principle that in enforcing the water rights along the San Joaquin River under the Central Valley Project *the Court should order a physical solution if possible*—it being admitted by the requests of all parties herein for a physical solution, that a physical solution was possible in the present case.

The Court below in three decisions approved a physical solution in this case, viz. *State v. Rank*, 293 F. 2d 340, 344.[67] In *State of California v. United States*

[67] "The California courts, confronted with the command of the 1928 Constitutional amendment that water should not be wasted,

*District Court*, 213 F. 2d 818, 321 (Footnote 9) (9th Cir.) (1954)[68] and in *People of State of California v. United States*, 235 F. 2d 647 at 662 (9th Cir. 1956).[69]

Moreover, the federal courts as stated, by the trial Court have long enforced decrees of physical solution involving the expenditure of money. Decrees of physical solution requiring the expenditure of money and making physical changes have been made by the federal courts, and since the approval of such a decree by the Supreme Court in *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 371, 31 S. Ct. 67, 54 L. Ed. 1074

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and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective * * * decree which for the sake of convenience is called a 'physical solution.'

"'In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements and fle ibility and expansiveness so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition.'"

*State v. Rank*, 293 F. 2d 340, 344 (1961).

[68]"9. The term 'physical solution' as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * *. See: Peabody v. City of Vallejo, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; Rancho Santa Margarita v. Vail, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; City of Lodi v. East Bay Municipal Utility District 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439, See also *Rank v. Krug*, D.C.S.C. Cal. 1950, 90 F. Supp. 773, 803."

*State of California v. United States District Court*. 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

[69]"* * *. Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

*People of State of California v. United States*, 235 F. 2d 647 at 662 (9th Cir.) (1956).

(1910), the power and duty of an equity court to do so does not seem to have been questioned in the higher courts. In that case the District Court of the Territory of Arizona, in a decree determining the rights of appropriators, appointed a water commissioner, and required a physical solution by giving him the power to:

> "direct the placing of proper gates, dams or other means for the control of the water of said river at the heads of the canals or other points on the banks of said canals as he may direct, at the expense of the parties hereto interested herein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water."

The Court while remanding the case for further proceeding in connection with a question of *res judicata,* nevertheless held that the decree appointing the water master with the power indicated, "did not transcend the bounds of judicial authority." See also the Ninth Circuit case of: *Gila Valley Irrigation Dist. v. United States,* 118 F. 2d 507 (1941), and *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.,* 245 F. 9 at 29 (9th Cir.) (1917).

After all, the appointment of a Watermaster by a court for the enforcement of its decrees is essentially no different than the exercise of the power of the federal courts to appoint a receiver, such as for railroads and the like.

In *State of Nebraska v. State of Wyoming,* 325 U. S. 589, 616, 65 S. Ct. 1332, 1350, 89 L. Ed. 1815 (1945), the Court said:

"There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving *administrative functions beyond our province.* * * *. But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The *difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.*" (emphasis ours)

In the case of *United States v. Angle, Equity No. 30*, in the United States District Court for Northern California the court appointed a water master in a water suit in which the United States was one of the parties.

(d) *Examples of Physical Solution Decreed by California Courts.*

"* * * the 1928 constitutional amendment, as applied by this court in the cases cited, compels the trial court, before issuing a decree entailing such waste of water, to ascertain whether there exists a *physical solution* of the problem presented that will avoid the waste, * * *." (emphasis ours)

*City of Lodi v. East Bay Municipal Utility District*, 7 Cal. 2d 316, 339, 60 P. 2d 439 (1936).

Since the 1928 Constitutional amendment, the Supreme Court of California has required or approved conditional inductions requiring physical solutions in the following cases: *Peabody v. City of Vallejo*, 2 C. 2d 351, 40 P. 2d 486 (1935); *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489,

45 P. 2d 972 (1935); *City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 60 P. 2d 439 (1936); *Reclamation District No. 833 v. Quigley*, 8 C. 2d 183, 188, 64 P. 2d 399 (1937); *Hillside Water Company v. City of Los Angeles*, 10 C. 2d 677, 76 P. 2d 681 (1938); *Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 81 P. 2d 533 (1938); *Meridian, Ltd. v. San Francisco*, 13 C. 2d 424, 90 P. 2d 537, 91 P. 2d 105 (1939) on petition for rehearing; *City of Pasadena v. City of Alhambra*, 33 C. 2d 908, 207 P. 2d 17 (1949); *Allen v. California Water & Telephone Co.*, 29 C. 2d 466, 176 P. 2d 8 (1946).

As stated it is not only within the power, *but it is also the DUTY of the trial Court to suggest on its own motion a physical solution if none satisfactory to it has been offered by the parties.* Moreover, the court possesses the power to enforce such solution regardless of whether the parties agree. *City of Lodi v. East Bay Municipal Utility District, supra*, 7 C. 2d 316, 60 P. 2d 439 (1936); *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, supra*, 3 C. 2d 489, 574, 45 P. 2d 972 (1935); *Rancho Santa Margarita v. Vail, supra*, 11 C. 2d 501, 559, 81 P. 2d 533 (1938).

> "* * *. The equity courts possess broad powers and should exercise them so as to do substantial justice, and in reference to physical solutions of the problems presented, an equity court is not bound or limited by the suggestions or offers made by the parties * * * if the trial court * * * should come to the conclusion, * * * that a substantial saving could be effected at a reasonable cost, by * * * changing some of the diversion ditches, it undoubt-

edly would have the power, * * * to make its injunctive order subject to conditions * * * keeping in mind * * * that plaintiffs have prior rights and cannot be required * * * to incur any material expense in order to accommodate defendant." (Syllabus)

*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 500-501, 45 P. 2d 972 (1935).

As part of the decree of physical solution the Court may order the subsequent appropriator *at its own cost to provide the owner of prior riparian rights with a supplemental, artificial surface supply without cost to the owner of the prior right.*[70]

The Court may order that the subsequent appropriator drill new wells at the expense of the subsequent appropriator.[71] The Court may order that the sub-

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[70] "* * *. The decree should then be reframed to provide that the duty rests upon the District to maintain the levels of the plaintiff's wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger points, the duty be cast upon the District to *supply water to the City*, or to raise the levels of the wells above the danger mark; and if the District does not comply with this order within a reasonable time, then the injunction decree already framed, * * * shall go into effect." (emphasis ours)

*City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 344, 60 P. 2d 439 (1936).

[71] "* * *. Such a decree would say to the District: You should maintain the water levels so as not to cause substantial damage to the city, and you may do this in any way best suited to your needs, or if you do not maintain those levels you should supplement the city's supply to the extent of the deficiency caused by your operations by the furnishing of water by artificial means and at your expense. If you do not do these things *you are subject to an injunction compelling releases to maintain natural conditions.*" (emphasis ours)

*City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 345, 60 P. 2d 439 (1936).

"The District also offered, * * * in case of shortage, to supply

sequent appropriator as a part of the plan of physical solution install new pumping plants for the owner of the prior right at the cost of the subsequent appropriator.[72] The Court may order the subsequent appropriator to build reservoirs on the subsequent appropriator's land to store winter waters and release the same to the holder of the prior right in the summertime.[73] The subsequent appropriator may be required, as a part of the plan of physical solution to build a dam on the lands of the holder of a prior riparian right during the summer irrigation season.[74] The Court may order that the height of the dam on the land of the holder of a prior riparian right be raised, apparently at the expense of the subsequent appropriator.[75] That

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the City of Lodi with water from its pipe line located a few miles from the city."

*City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 341, 60 P. 2d 439 (1936).

[72]"* * *. It may also be possible to install pumping plants upstream from the reservoir so as to provide drinking places for respondent's cattle."

*Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

[73]"* * *. It may be that there are storage and reservoir sites so located on appellants' ranch, that by the diversion and storage of winter waters * * *, appellants can secure all the water they reasonably need. Perhaps by regulating the releases from such reservoirs in the summer months surface flow can be made available to respondent."

*Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 559, 560, 81 P. 2d 533 (1938).

[74]"* * *. It may be that there are storage and reservoir sites so located on appellants' ranch, that by the diversion and storage of winter waters * * *, appellants can secure all the water they reasonably need. Perhaps by regulating the releases from such reservoirs in the summer months surface flow can be made available to respondent."

*Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 559, 560, 81 P. 2d 533 (1938).

[75]"* * *, after referring to Lake O'Neill reservoir the court found 'that by the expenditure of reasonable sums of money the

the subsequent appropriator be required to construct a new ditch at the subsequent appropriator's expense,[76] be changed at the cost of the subsequent appropriator,[77] that the point of diversion of a canal at a damsite located upon the lands of a holder of the riparian right that the capacity of the reservoir be increased.[78] The Supreme Court of the State of California as did the District Court has also apparently cited with approval that as a part of a plan of physical solution the Court might order the *installation of five collapsible check dams to pond water so that it would percolate into the lands of the prior riparian owner—the cost of said dams to be borne by the subsequent appropriator.*[79]

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artificial dam at said Lake O'Neill reservoir may be increased in height * * *.'"

*Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

[76] "* * *. The equity court possesses broad powers and should exercise them * * *, if the trial court, * * *, should come to the conclusion, * * *, that a substantial saving could be effected at a reasonable cost, by * * * changing some of the diversion ditches, it undoubtedly would have the power, * * *." (Syllabus)

*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 500, 45 P. 2d 972 (1935).

[77] "'* * * the point of diversion of the ditch leading into said reservoir may be moved upstream and the capacity of said reservoir increased, * * *.'"

*Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

[78] "'* * * the point of diversion of the ditch leading into said reservoir may be removed upstream and the capacity of the reservoir increased, * * *.'"

*Rancho Santa Margarita v. Vail*, 11 C. 2d 501, 560, 81 P. 2d 533 (1938).

[79] "* * *. The plaintiff offered to accept in lieu of the injunction claimed by it the construction by the defendants at their expense of five collapsible ponding dams * * *. It was the plaintiff's contention that these dams could be so operated as to maintain by artificial means the static head and percolation which the Mokelumne River had prior to its regulation by the defendants. The ultimate cost of this physical solution would be

The District Court in this case made the same type of order for ten collapsible check dams.

The Supreme Court of California as did the District Court in this case also has the power to order that periodic flushing flows of 2,000 second-feet be released by respondents owning an upstream dam and subsequent appropriative rights every three months to eradicate the growth of algae and remove silt from the river channel so that the water would percolate as in the state of nature just as the District Court did here and that water levels be maintained in test wells at minimum levels by the subsequent appropriator.[80]

It will thus be seen that the District Court under the California decisions had the power to grant all features of the physical solution by the District Court to appellant City of Fresno and farmers on the 38-mile stretch of the river between Friant and Gravelly Ford Canal. (From the case of *City of Lodi v. East Bay Municipal Utility District,* 7 C. 2d 316, 60 P. 2d 439 (1936), it will be noted that the court could have decreed, although it did not, that in the place of check dams to percolate water from the river into the City's wells the Court could have ordered respondent officials

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at least several hundreds of thousands of dollars. This offer was rejected by counsel for both defendants."

*City of Lodi v. East Bay Municipal Utility District,* 7 C. 2d 316, 328, 329, 60 P. 2d 439 (1936).

[80]"* * * the court found that certain flushing releases were required to clear the channel of silt, algae and vegetation in order to keep the percolation rate as it would exist in the state of nature. * * * three flushing flows of 2,000 second-feet for May 1st, July 1st and August 1st are provided. * * *."

*City of Lodi v. East Bay Municipal Utility District,* 7 C. 2d 316, 332, 60 P. 2d 439 (1936).

to bring in water by pipe line from Friant Dam to the City without cost to the City. As shown the Supreme Court of California has therefore specifically approved every feature of the physical solution ordered by the District Court in this case. For example, the collapsible dams to pond the waters of the river for the purpose of bringing water to the pumps of the riparian farmers and causing percolation into the underground, the required releases (in cubic feet per second and acre-feet per month), the construction and raising of dams and other matters requested by the appellants and has ruled that the District Court has the reserved power to enjoin *any* diversion of water if the subsequent appropriator will not conform to, construct and pay for the decreed plan of physical solution of the District Court and the District Court by injunction may require such subsequent appropriator, in event he fails to carry out the plan of physical solution, even though wasteful, to release a sufficient flow of the river to maintain the rights of the prior riparian overlying owners to water without diminution (*Peabody v. City of Vallejo*, 2 C. 2d 351, 40 P. 2d 486 (1935)), at the sole expense of the subsequent appropriator as similarly prayed for by the appellant in this case and decreed by the District Court.

The physical solutions presented by the various parties to this suit and the physical solution finally adopted by the District Court appear in the subsequent subchapter of this brief entitled "History of Litigation."

## D. History of Litigation.

A detailed history of the litigation in this case from the time of filing this suit in the Superior Court of Fresno County on September 25, 1947, to close of the trial in the U. S. District Court December 31, 1954 appears in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

The District Court in its decision decreed a plan of physical solution consisting of 10 check dams to be located between Friant Dam and Gravelly Ford Canal for ponding of the water back of the check dams to supply the riparian owners and to supply percolation into the alluvial cone of the San Joaquin River. A photograph of the type of check dam decreed by the Court, and designed by Charles H. Lee, a leading consulting engineer, and Otto Peterson, former chief construction engineer of Pacific Gas and Electric Company in California, is shown in the following picture.

**Ease of Operation of Collapsible Check Dams Demonstrated to Court, 1952. Dam of Pacific Gas and Electrict Co. on Feather River in California.**

The physical solution was made in accordance with the decisions of this Court and the California Supreme Court.

> "* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory* that he find some physical solution, at his expense, to preserve existing water rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken. Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P. 2d 486; City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 60 P. 2d 439; Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 76 P. 2d 681; City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585; Los Angeles Flood Control District v. Abbot, 24 Cal. App. 2d 728, 76 P. 2d 188.
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> "It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of the San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." (emphasis ours)
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> *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"* * *. The decree should then be framed to provide that the duty rests upon the District to maintain the levels of the plaintiff's wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger points, the duty be cast upon the District to *supply water to the City*, or to raise the levels of the wells above the danger mark; and if the District does not comply with this order within a reasonable time, then the injunction decree already framed, * * * shall go into effect." (emphasis ours)

*City of Lodi v. East Bay Municipal Utility District*, 7 C. 2d 316, 344, 60 P. 2d 439 (1936).

The Bureau engineers estimated their plan of physical solution would take 60,000 acre-feet per year to operate and that the City's would take 70,000 acre-feet. The Bureau has actually used 626,000 acre-feet of water per year.[81]

The Court also gave a declaratory judgment decreeing that the City of Fresno was entitled to all the water needed for its municipal and domestic purposes before any water was transferred out of Fresno County, the county and watershed of origin of the San Joaquin River.[82]

The United States and the defendant districts had no right to divert water at Friant which is presently

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[81] 1951-1952, 1952-1953, 1953-1954, 1954-1955, 1955-1956, 1956-1957, 1957-1958, 1958-1959, 1959-1960, U. S. Geological Survey, Water Supply Papers. Later papers not available when this brief written.

[82] "(265) Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point."

*Rank v. (Krug) United States*, 142 F. Supp. 1, 184 (1956).

needed by the City of Fresno for its domestic and municipal purposes and the City of Fresno is entitled to a declaratory judgment to that effect.

> *"The City of Fresno lies in a position of great natural advantage insofar as water is concerned; it is but a short distance from two rivers, the San Joaquin and the Kings, with a combined average flow of approximately 3,000,000 acre-feet. And yet, it is now in the anomalous position of being short of water to supply its inhabitants for the highest and best use, with the United States astride both rivers with gigantic dams exporting water to irrigation districts in counties and watersheds other than the San Joaquin and Kings, which water it used not as primary supply, but as a supplemental supply for irrigation and agricultural purposes, declared by California law to be secondary to the highest and best use of municipalities for domestic purposes."*
>
> *Rank v. (Krug) United States,* 142 F. Supp. 1, 185 (1956).

The District Court in its decision also held that any charge to the City of Fresno for this water in excess of the Class I irrigation rate ($3.50 per acre-foot) was unreasonable and beyond the statutory authority of respondent officials to make *(Rank v. (Krug) United States,* 142 F. Supp. 1, 185 (1956).).

## VI.
## CITY OF FRESNO AND ITS WATER SUPPLY DESCRIBED.

### A. Population.

Appellant City of Fresno at the close of the trial in December, 1954, was a city of 107,907 population (1954 gasoline tax census).[83] According to the last official census of November, 1960, the population had increased to 141,600, showing its rapid growth.

The population of Fresno City has shown a continual and steady growth of 46% *every ten years.* Based on this percentage of growth, its estimated population in 1980, only 18 years hence, is 251,541.[84] Its estimated population by the year 2,000 is 493,020.[84] The following is Mr. Segal's (he was the City Engineer during the trial of *Rank v. Krug)* estimate of Fresno's future growth in population based on Appellant City of Fresno's Exhibit 445:

| "Year | Population |
|---|---|
| 1950 | 91,669 |
| 1960 | 128,337 |
| 1970 | 179,672 |
| 1980 | 251,541 |
| 1990 | 352,157 |
| 2000 | 493,020 |
| 2010 | 690,228 |
| 2020 | 966,319" |

Fresno is the capital of Fresno County, the "county of origin of waters of the San Joaquin River".[85] In

[83]Rep. Tr. 23,363.

[84]R. 2324, Pltf. Ex. 445, 23,678.

[85]"* * * The San Joaquin River is a natural watercourse arising in the Sierra-Nevada in Fresno and Madera Counties." *Meridian, Ltd. v. San Francisco,* 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

other words, Fresno is located in both the county of origin and watershed of the San Joaquin River.

Fresno is located in the County of Fresno, the largest producer of agricultural crops of any county in the world.[86]

The total value of agricultural crops produced in Fresno County in 1951 was $325,579,150.00[87] and at the close of 1961 Fresno County was still the largest producer of agricultural crops in the world. For the year ending December, 1961, the total value of Fresno County's agricultural crops was $385,381,340.00.[88]

Fresno lies less than 3 miles from the San Joaquin River and less than 7 miles from Friant Dam and is therefore in an area "immediately adjacent to the Central Valley Project" as used by the acts of Congress heretofore cited and therefore is entitled to purchase municipal water from the Central Valley Project under the April 16, 1906, 34 Stat. 116[89] amendments to the reclamation law as well as under the Act of August 26, 1937, 50 Stat. 844, and the Act of August 4, 1939, 53 Stat. 1187, and other Acts of Congress reauthorizing the Central Valley Project.

The City of Fresno is also partially located within the alluvial cone of the San Joaquin River.[90] That part of the City of Fresno lying on the alluvial cone of the San Joaquin is supplied in whole or in part by percolation from the San Joaquin River.[91] The Dis-

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[86]R. 347 (New Volume), Pltf. Ex. 210, 15,497.

[87]R. 347 (New Volume), Pltf. Ex. 210, 15,497.

[88]1961 Agricultural Crop Report, Fresno County.

[89]Act of April 16, 1906, 34 Stat. 116, 117.

[90]Exhibit II of this brief.

[91]"Q. And you consider the percolation, the present percolation from the San Joaquin River and from time immemorial, a

trict Court found this to be the fact,[92] and the court below sustained the District Court in this finding.

Over 75% of the alluvial cone of the San Joaquin River is located in Fresno County (see Exhibit II of this brief). Therefore 75% of the 200,000 acres which the District Judge found would be seriously damaged and 75% of the 100,000 acres, or 75,000 acres of the land the District Judge found would have its underground water destroyed if respondents' plan of physical solution is put into operation and not the physical solution of the District Judge. [See R. 783, Find. 26.] This land as just shown comprises the finest and the highest producing agricultural land in the United States.

### B. The Water Supply of the City of Fresno.

The water supply of the 107,907 population of the City of Fresno at the close of the trial in the District Court in December, 1954, came from the city's wholly owned municipal water system, acquired in the year 1931, and which at the trial of this action was valued at $5,181,368.00 in 1954.[93] Due in considerable measure to expenses caused by the city's rapidly falling water table and new installations the value of Fresno's municipal water system as of June 30, 1962, had risen to 10,870,129.[94] It was purchased under the representations by state officials that its water filings on the

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major source of supply to the wells within the boundaries of the City of Fresno and lying within the alluvial cone of the San Joaquin River?

The Witness: Yes, it is one of the sources of supply of that area, and one of the major sources."

R. 1409, Testimony of Charles H. Lee, Rep. Tr. 1480.

[92]R. 769, 770, Finding 21.

[93]R. 355 (New Volume) Pltf. Ex. 420, 23,444.

[94]June 30, 1962, Report of Fresno City Water Department.

San Joaquin River would be honored as having first priority and that Fresno would have a supplement surface water supply for the San Joaquin River.

The Fresno City Municipal Water Department pumps its entire water supply from the underground percolating waters underlying the City of Fresno, part of which as stated lies on the alluvial cone of the San Joaquin River (see "Lee's Line," Exhibit II this brief). The wells on the alluvial cone of the San Joaquin River were in large measure supplied by water which formerly percolated from the San Joaquin River prior to Friant dam.[95]

### C. The Respondent Bureau of Reclamation Officials Admit That the Underground Water Supply of the City of Fresno Is Limited to 30,000 Acre-Feet per Year.

The percolating underground supply, on which the City of Fresno is wholly dependent, had a reliable supply of only 30,000 acre-feet per annum according to respondents' own witness,[96] in 1952.

### D. The City of Fresno Is Badly Overpumping the Fast Diminishing Supply of Its Wells.

The wells of the City of Fresno in 1954, the last year of the trial before the District Court, pumped *ap-*

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[95]"The Witness: Yes, it is one of the sources of supply of that area, and one of the major sources."

R. 1409, Testimony of Charles H. Lee, Rep. Tr. 1480.

[96]"By Mr. Rowe: Q. Mr. Hill, then at the present time, from your own figures, if they are pumping 43,000 acre-feet, in the City of Fresno now, and in the next 50 years, you would only suggest pumping 30,000 acre-feet, are they not overpumping in the City of Fresno 15,000 acre-feet now? A. They are definitely overpumping.

Q. Is that the amount, 15,000 acre-feet?

The Court: It is all above 30,000?

The Witness: Yes."

Testimony of Leland Hill, Rep. Tr. 15,615.

*proximately 43,000 acre-feet of water annually, or 13,000 acre-feet more than a safe yield of the wells.* In the year ending 1959, the city's wells pumped 60,700 acre-feet[97] or an increase of 17,000 acre-feet during the five year period since the close of the trial in the District Court and 30,000 acre-feet more than the safe yield of its wells according to the respondent officials' *own engineers.*

**E. The City of Fresno Needs a Supplemental Surface Water Supply of at Least 100,000 Acre-Feet Annually.**

The respondent Bureau of Reclamation officials' witnesses, admitted the overpumping by the City and that the city in 1954 needed AN EVENTUAL SUPPLEMENTAL SURFACE SUPPLY OF 100,000 ACRE-FEET PER YEAR.[98] The City engineer's estimate is 50% higher but in fairness we use the estimates of respondents' engineers.

Mr. Irving Ingerson, Chief Hydraulic Engineer of the State of California, placed on the stand by the State of California, testified that only one-third of the Fresno City water supply in the future (*i.e.* after the close of the trial in the District Court in 1954) could be pumped from the underground and that the city as early as 1952 was in need of an immediate supplemental surface water supply for the other two-thirds of its municipal water supply.[99]

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[97] 1959 Fresno City Water Department Report.

[98] "The Court: He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet.

By Mr. Rowe: Q. * * * needs another 100,000 acre-feet from another source? A. That is *correct.*"

R. 1983, Testimony of Leland Hill, Rep. Tr. 15,613, 15,614.

[99] "* * * we have to think of the future and the growth of the

**F. The Respondents' Bureau of Reclamation Engineers Admit the Bureau Had at Least 50,000 Acre-Feet of Water in Friant Available to the City.**

Moreover, the Chief Water Rights Engineer of the United States Bureau of Reclamation, Leland Hill, during the trial before the District Court then went on to testify THAT THE BUREAU OF RECLAMATION HAD AVAILABLE AT FRIANT FOR THE CITY OF FRESNO, 50,000 ACRE-FEET OF CLASS I IRRIGATION WATER WHICH THEY DID NOT NEED AND COULD SUPPLY THE CITY OF FRESNO WITH THIS WATER WITHOUT INFRINGING ON THE WATER SUPPLY OF ANY RESPONDENT DISTRICT "that we now have contracts with *or contemplate* contracts with". The actual amount available was later found to be nearly 96,000 acre-feet due to the fact the Friant-Kern Canal did not seep as much as expected. This was strictly Class I Irrigation water.

> "THE WITNESS: Your Honor, the operation studies that have been made * * * and as they were originally presented to the various irrigation districts included Class I water in an amount of 800,000 acre-feet and the United States can contract Class I water up to that quantity without infringing upon the water supply from the project to the various districts that we now have contracts with *or contemplate contracting with.* There is approximately 50,000 acre-feet of water that could be made available.

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city, and my thought is at least two-thirds of the total requirements that the city could anticipate in the future should be derived from outside."

R. 1896, Testimony of Irvin M. Ingerson, Rep. Tr. 12,788, 12,789.

"THE COURT: Where?

"* * *

"THE WITNESS: In Millerton Lake, your Honor."

Testimony of Leland Hill, Rep. Tr. 15,611.

This desperate situation of the future water supply of the City of Fresno is also shown by the following chart prepared by Fresno City Engineer, Segel, and introduced at the trial showing the consistent growth, estimated future population of the *metropolitan area* served by the Fresno City Municipal Water Department, and estimated future water requirements of the City of Fresno Water Department:

"40% INCREASE

| "Year | Population | Water Consumption |
|---|---|---|
| 1950 | 106,592 | 41,574 acre-feet per year |
| 1960 | 149,229 | 56,670 " [100] |
| 1970 | 208,921 | 79,338 " |
| 1980 | 292,489 | 111,073 " |
| 1990 | 409,484 | 155,501 " |
| 2000 | 573,278 | 217,702 " |
| 2010 | 802,589 | 304,783 " |
| 2020 | 1,123,625 | 426,696" " |

NOTE: The population increase since 1900 has been 46% each 10 years.[101]

As stated the city pumped 60,700 acre-feet in 1959 or nearly 3,000 more acre-feet than Segel estimated would be needed a year earlier in 1960 showing that his estimates for future use by the City of Fresno was on the conservative side.

[100]The actual pumping for 1959, one year earlier, was 60,700 acre-feet.

[101]R. 2323, Pltf. Ex. 444, 23,674.

The chart now herein inserted (Exhibit V, see page opposite) shows a continual drop in the water levels of the city wells since 1942.

The water level map prepared by the State of California showing drops in excess of more than 35 feet in the water level of certain City of Fresno wells in the first four years of operation of Friant Dam appears on Pltf. Ex. 188, Cal. Ex. DD, R. 2349, 10,781. WHICH WE RESPECTFULLY ASK THIS COURT TO EXAMINE.

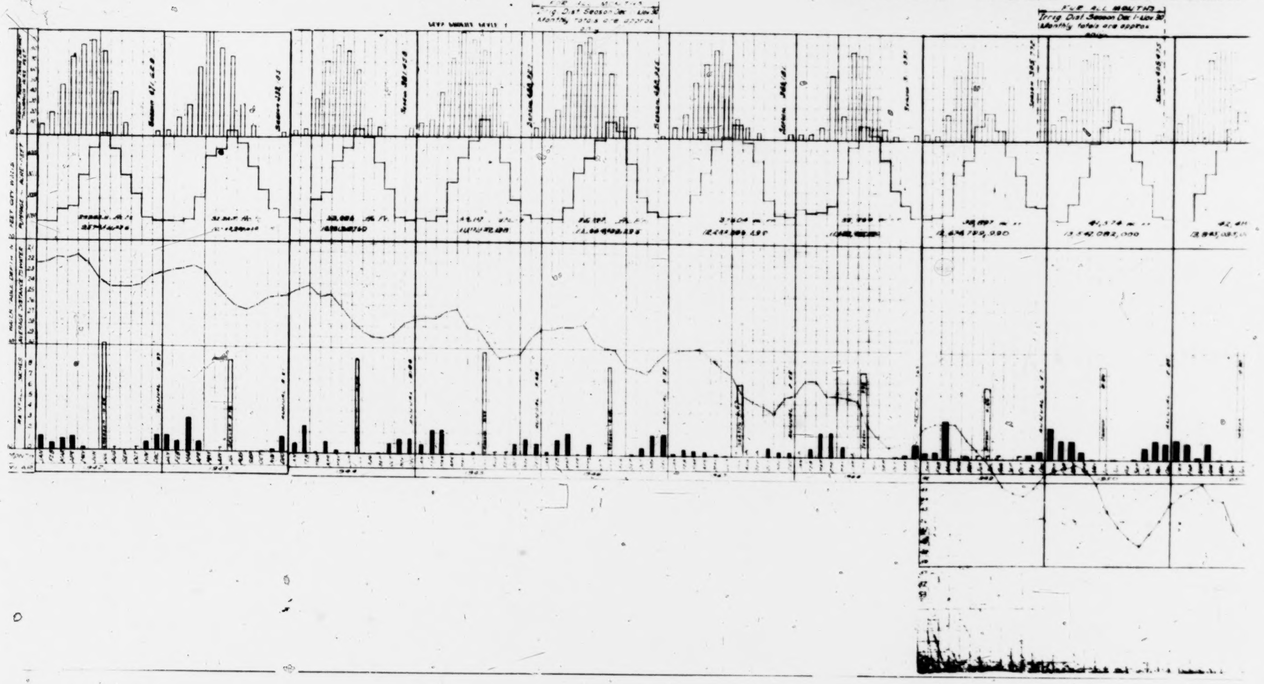
As stated, the District Judge found water levels in the alluvial cone of the San Joaquin River had dropped in some places over 100 feet in the five-year period since the start of operation of Friant Dam. [R. 784, Finding 26.]

The City of Fresno has no place to go for a supplemental water supply except from the Central Valley Project. In 1956 the District Judge found that the city's water supply had reached the critical point.

### G. The City of Fresno Is in the Service Area of the Central Valley Project.

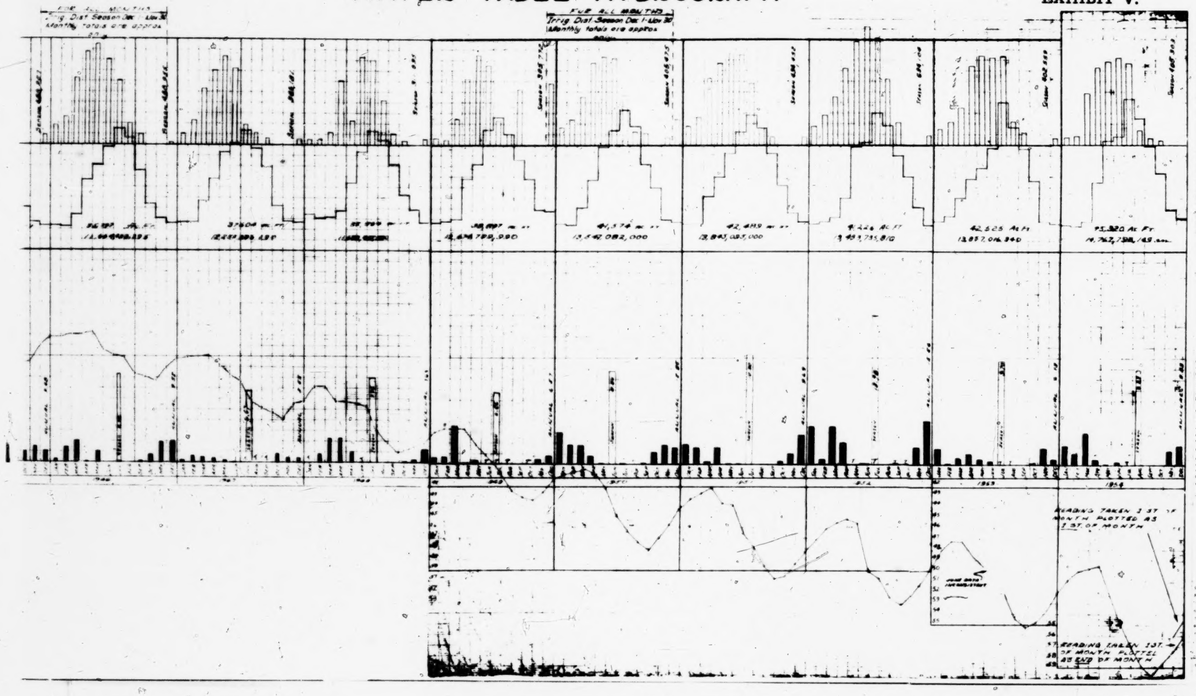
We have heretofore shown in the foregoing subchapter of this brief entitled "Legislative History of the Central Valley Project" that beginning with the approval by the people of California in 1933 one of the primary purposes of Friant Dam was to provide water for domestic and municipal use, that when the Central Valley Project was approved by President Roosevelt in the Feasibility Report of 1935, domestic and municipal uses were approved as primary uses of the project and that when Congress authorized and reauthorized the Central Valley Project, the Central

# WATER TABLE HYDROGRAPH



# WATER TABLE HYDROGRAPH

EXHIBIT V.



Valley Project was authorized and reauthorized for domestic (Act of August 26, 1937, 50 Stat. 844) and municipal uses (Act of August 4, 1939, 53 Stat. 1187.) To the same effect is the ruling of this Court[102] and other acts. In closing our discussion of the service area of the Central Valley Project we call the court's attention to the map on the page following (Exhibit VI[103] of this brief) and this statement of part of the decision of the California Water Rights Board:

> "Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."
>
> State of California, State Water Rights Board, Decision No. D-935, adopted June 2, 1959, p. 68.

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[102] "32. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno*, Tulare, Kings, and Kern in the State of California." (emphasis ours)

*Gerlach Live Stock Co. v. United States*, 111 C. Cls. 1, 24, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"* * *. The object of the plan is to arrest this flow and regulate its seasonal and year-to-year variations, thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an *adequate* supply of water for *municipal* and irrigation purposes, facilitating navigation, and generating power." (emphasis ours)

*Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

[103] "The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (emphasis ours)

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

Due to Boke's refusal to negotiate for municipal water, his illegal granting of water to irrigate 339,000 acres of non-cultivated lands in violation of the Feasibility Report and acts of Congress, and his exhorbitant municipal charges, with the exception of Fresno, only a few feet of municipal water out of Friant Dam was ever contracted for to the small towns of Friant and Orange Cove.[104]

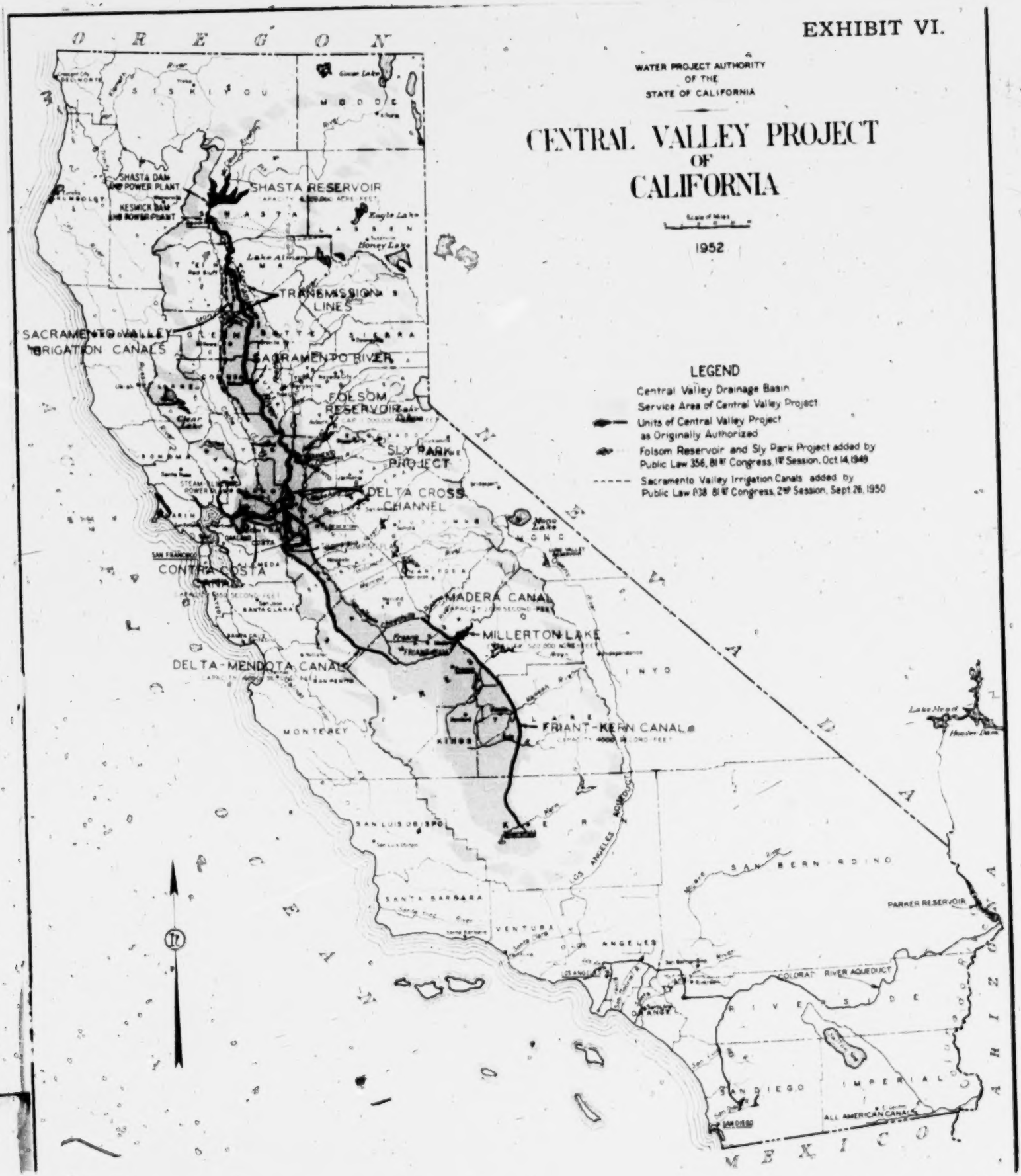
As has heretofore been shown and will be shown in the following chapter of this brief entitled "argument" due to the domestic and municipal priority of Appellant City, due to the fact the City of Fresno is in the county and watershed of origin, due to the fact it is in the service area of the Central Valley Project and due to the fact that it is desperately in need of water with no other place to get it except from the Central Valley Project it is submitted that the City is entitled to at least a total of 100,000 acre-feet (40,000 in addition to its present contract) of this irrigation water and that the price for the entire 100,000 acre-feet be reduced to $3.50 per acre-foot. These points will be more fully discussed in the following chapter of this brief entitled "Argument".

## H. The Percolating Water Rights of the City of Fresno.

As heretofore shown, a large number of the wells of the City of Fresno's municipal water department are located in the alluvial cone of the San Joaquin River and are supplied from percolation from the San Joaquin River. These percolating rights of the City are

[104]Bulletin No. 2, "Feasibility of State Ownership and Operation of the Central Valley Project of California," Water Project Authority of the State of California, Earl Warren, Governor, March, 1952.

EXHIBIT VI.


WATER PROJECT AUTHORITY
OF THE
STATE OF CALIFORNIA
CENTRAL VALLEY PROJECT
OF
CALIFORNIA
1952
OREGON
NEVADA
ARIZONA
MEXICO
SHASTA DAM AND POWER PLANT
KESWICK DAM AND POWER PLANT
SHASTA RESERVOIR
TRANSMISSION LINES
SACRAMENTO VALLEY IRRIGATION CANALS
SACRAMENTO RIVER
FOLSOM RESERVOIR
SLY PARK PROJECT
DELTA CROSS CHANNEL
CONTRA COSTA
MADERA CANAL
MILLERTON LAKE
DELTA-MENDOTA CANAL
FRIANT-KERN CANAL
COLORADO RIVER AQUEDUCT
PARKER RESERVOIR
ALL AMERICAN CANAL
LEGEND
Central Valley Drainage Basin
Service Area of Central Valley Project
Units of Central Valley Project as Originally Authorized
Folsom Reservoir and Sly Park Project added by Public Law 356, 81st Congress, 1st Session, Oct. 14, 1949
Sacramento Valley Irrigation Canals added by Public Law 838, 81st Congress, 2nd Session, Sept. 28, 1950

the same as or analogous to a riparian right. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935).) The District Court found that these wells on the alluvial cone would be seriously damaged if the Bureau's plan of physical solution was adopted and the flow of the San Joaquin cut to 60,000 acre-feet annually as threatened by Boke. The City's right to this underground water due to its domestic priority and location in the county and watershed of origin will be discussed under the following chapter of this brief entitled "Argument".

## VII.

## SUMMARY OF ARGUMENT.

In accordance with Rule 40(f) of this Court the following summary of argument is here set forth:

1. The determination of the limits of the statutory authority of an administrative official is a judicial and not an administrative determination.

2. The determination of whether charges for water to the appellant City of Fresno from the Central Valley Project are reasonable or unreasonable arbitrary and illegal, is a judicial and not an administrative determination.

3. That an action to determine whether rates for water charged to the City of Fresno by the respondent officials out of the Central Valley Project are reasonable or unreasonable, illegal or arbitrary, is not a suit against the United States, and the United States is not an indispensable party to such an action.

4. That in view of the fact there was no designation of error in respondents' record on appeal in the Court below nor in any of respondents' petitions for

certiorari under Rule 23(c) of this Court the decision of the District Court that any charge for Central Valley Project water in excess of the charge for Class I irrigation water ($3.50 per acre-foot) was unreasonable, must stand if this determination of this matter of unreasonableness and illegality is a judicial determination.

5. That respondent officials are not authorized to add a profit in rates charged for water to the City of Fresno out of the Central Valley Project in addition to a proportionate charge for construction costs and operation and maintenance charges allocable to municipal water together with interest thereon at a rate not to exceed 3½ per cent as provided for in the Basic Reclamation of June 17, 1902, 32 Stat. 388; the Municipal Water Act of April 16, 1906, 34 Stat. 116-117; the Central Valley Act of August 26, 1937, 50 Stat. 844, 850; and the Act of August 4, 1939, 53 Stat. 1187, 1194, and the *Act of July 2, 1956,* 70 Stat. 433.

6. That Congress never authorized the taking of the riparian and overlying rights of the farmers between Friant Dam and Gravelly Ford Canal, nor the overlying percolating water rights of the City of Fresno supplied by seepage from the San Joaquin River and that by reason of this lack of statutory authority respondent officials cannot take said rights by eminent domain or by condemnation. This is true because of the laws of the State of California giving domestic and municipal water priority and requiring water to be reserved to the watershed and counties of origin before being exported elsewhere and because the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, and the Act of July 2, 1956, 70 Stat. 480, 484, reau-

thorizing the Central Valley Project specifically required the respondents to construct and operate the Central Valley Project in accordance with California water laws and because the Act of Congress of October 14, 1949, 63 Stat. 852, 853, specifically required respondents to carry out California county of origin and watershed of origin laws in the construction and operation of the Central Valley Project.

7. That the United States has waived its immunity to suit under the Act of July 10, 1952, 66 Stat. 516, 560, and other Acts and by its conduct in voluntarily becoming a party in the decision of the California Water Rights Board which has become final and which provided that said decision should be subject to the final decision in this case.

8. That the fact that a few of the named plaintiffs in the class action part of this suit had infinitesimal prescriptvie and appropriative rights to water of the San Joaquin River as well as riparian rights, as did the class they represent, did not justify a reversal of the District Court and prevent the waiver of immunity of the United States since the error, if any, was so inconsequential and immaterial as not to justify a reversal.

9. That the City of Fresno is in the service area of the Central Valley Project and is entitled to have its municipal water needs supplied at least up to a minimum amount of at least 100,000 acre-feet, which amount the Bureau of Reclamation engineers testified was the minimum amount the City requires.

10. That the decision of the District Court that any charge for water to the City of Fresno in excess of the Class I irrigation water rate ($3.50 per acre

foot) was unreasonable, arbitrary and in excess of the statutory authority of respondent Bureau officers must stand since no objection was raised in respondent's points on appeal or in their petition for certiorari this being a judicial decision.

11. That the lower Court erred in relieving the respondent irrigation districts from the operation of the injunctive decree of the lower Court although correctly retaining them as parties since they with two exceptions voluntarily entered the suit, since all districts joined in asking the affirmative relief of a physical solution and since this Court has held that these irrigation districts taking water from a reclamation project, not the government, are the real owners of the water of the project subject, of course, to the prior vested rights of the owners along the stream, original plaintiffs.

12. That the plan of physical solution approved both by the District Court and the court below should be affirmed in accordance with the principles approved by this Court.[105] It is best for all parties as it will pos-

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[105] "* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory that he find some physical solution*, at his expense, to preserve existing prior rights * * *."

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a *physical solution* as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

*Gerlach Live Stock Co. v. United States*, 111 Ct. Cls., 1 at 81, Aff. 335 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

sibly save the government over $100,000,000 in damages in eminent domain if this court should find respondent officials can take the riparian and overlying percolating water rights of the farmers between Friant Dam and Gravelly Ford Canal, will supply the riparian rights of the original plaintiffs and of the Appellant City of Fresno and will provide sufficient water so that probably the contracts of all Respondent Districts can be fulfilled as well as providing at least 100,000 acre-feet of class I surface irrigation water for the City of Fresno, said amount the engineers for Respondent Bureau of Reclamation officials found the City of Fresno needs.

13. That the decision of the District Court should be affirmed in its entirety and the Court below reversed on all matters in which the Court below reversed the District Court.

14. That the respondent officials are not entitled to make a profit from sales of waters to municipalities but are only entitled to the return of an equitable allocation of construction and costs of operation and maintenance with interest in the Secretary's discretion, not to exceed 3½%.

## VIII.

## ARGUMENT.

### A. The Determinaiton of the Limits of Statutory Authority of an Administrative Official Under Acts of Congress Such as Those Authorizing the Central Valley Project Is a Judicial and Not an Administrative Decision as Erroneously Held by the Court Below.

That the determination of the limits of the powers of an administrative official such as are the respondent Bureau of Reclamation officials under the acts of Congress governing reclamation projects in general, and the Central Valley Project in particular, is a judicial and not an administrative determination is, we submit, too clear for argument.[106]

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[105] "* * *. The responsibility of determining limits of statutory authority of administrative agencies is a judicial function * * *." (Syllabus.)

*Stark v. Wickard*, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944).

"This suit alleges that the Secretary of Agriculture is disobeying a congressional mandate. Such allegation gives this court jurisdiction and the suit is not one against the United States * * *.

"(2) In this case the Secretary has disobeyed the congressional mandate."

*Publicker Industries v. Anderson*, 68 F. Supp. 532, 533 (1946).

"* * * where he (the head of a department) is directed by law to do a certain act affecting the absolute rights of any individuals, * * * the performance of which the President cannot lawfully forbid, * * * it is not perceived on what ground the courts of the Country are further excused *from the duty of giving judgment that right be done to an injured individual*, than if the same services were to be performed by a person not the head of a department." (emphasis ours)

*Marbury v. Madison*, 5 U. S. 137, 170, 2 L. Ed. 60 (1803).

"The president (of the United States) *cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law.*" (Syllabus; emphasis ours.)

*Marbury v. Madison*, 5 U. S. 137, 2 L. Ed. 60 (1803).

"* * *. But public officials may become tort-feasors by ex-

**B. The Decision of the Court Below That the Determination of Whether Charges for Water to the City of Fresno by the Respondent Bureau of Reclamation Officials Were Reasonable or Unreasonable, Arbitrary, Illegal and Capricious and Whether Such Rate Was in Excess of the Statutory Authority Granted Respondent Officials by Congress Was an Administrative Decision and Not a Judicial Decision Is in Error and Should Be Reversed by This Court.**

The Court below held that the determination of whether a water rate under a Bureau of Reclamation Project was reasonable or unreasonable, arbitrary, capricious or illegal was strictly an administrative and not a judicial determination. We quote from the decision of the Court below:

> "* * *. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable."
>
> *State of California, United States of America v. Rank*, 293 F. 2d 340, 352 (1961).

We submit that the Court below is in error in its above decision and should be reversed.

Unreasonable has been defined as meaning "arbitrary": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939):

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ceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law *or in equity*, he is not relegated to the Court of Claims to recover a money judgment." (emphasis ours)

*Land v. Dollar*, 330 U. S. 731, 738, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

*Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942); *State v. Pubic Service Commission*, 179 S. W. 2d 132, 238 Mo. 317 (1944); "capricious": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939); *Harris v. State Corporation Commission, supra;* "illegal": *City of Louisville v. Koenig*, 162 S. W. 2d 19, 290 Ky. 562 (1942); "without support in evidence": *Application of Chicago B. & Q. R. Co.*, 295 N. W. 389, 138 Neb. 767 (1940); "confiscatory": *Lone Star Gas Co. v. State*, 153 S. W. 2d 681, 137 Tex. 279 (1941); and "irrational": *Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942).

It is for the courts to determine whether a water rate is reasonable or unreasonable, arbitrary, capricious or illegal. This is a judicial not an administrative function.

*Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

*Yuma County Water Users' Ass'n v. Schlecht*, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

*Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 F. 72 (8th Cir.) (1914).

"12. The public have a right to be exempt from unreasonable exactions * * *." (Syllabus)

*Smyth v. Ames*, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *.

The public cannot properly be subjected to unreasonable rates * * *."

*Covington & L. Turnpike Co. v. Sanford*, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896).

*Stark v. Wickard*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional *one, either to protect the public against excessive or unreasonable charges*, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (emphasis ours)

43 Am. Jur. 693, 694.

It is submitted that as was stated by this Court there is no place in the American constitutional system for the exercise of such arbitrary power by the respondent Bureau of Reclamation officials as occurred here.

"In our view, this case resolves itself into a question of the power of the Secretary of the Interior * * *. But as has been affirmed by this court in former decisions there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law then there is power in the court to resolve the status of the parties aggrieved by such unwarranted action." (emphasis ours)

*Garfield v. United States, ex. rel. Goldsby,* 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908).

"Arbitrary power and the rule of the constitution cannot both exist."

*Jones v. Securities and Exchange Commission,* 298 U. S. 1, 24, 56 S. Ct. 654, 661, 80 L. Ed. 1015 (1936).

It is further submitted that the mere fact that the record title to the reclamation works is in the government or even if we assume that the title to the water is in the government and not in the respondent districts which it is not, the jurisdiction of this Court would not thereby be defeated as stated by this Court:

"1. The fact that the legal title to allotable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickashaw Nations the name of one who has received an allotment certificate and is in the possession of the land." (Syllabus)

*Garfield v. United States, ex rel. Goldsby,* 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908).

However, title to the water in the Central Valley Project is not in the government but in the landowner subject to prior rights of original plaintiffs.

"* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall

be the basis, the measure, and the limit of the right."

Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. Sec. 391.

Congress in its legislation regarding the Central Valley Project again reaffirmed the above provision and provided that the water from a reclamation project is appurtenant to the land and therefore owned by those landowners being served from the project.

"* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

Act of July 2, 1956, 70 Stat. 483, 484.

Moreover, this is the holding of this Court.

"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A. 372-382, provided: * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated. * * *. We can say here what was said in Ickes v. Fox, supra, 300 U. S. pages 94 and 95, 57 S. Ct. page 416, 81 L. Ed. 525: 'although the government diverted, stored and distributed the water the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made *not* for the use of the government but under the Reclamation Act for the use of the landowners, and by the terms of the law and of the contract already referred to *became the property of the landowners* wholly distinct from

the property right of the government in the irrigation works. Compare Murphy v. Kerr, (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*Id.*) with the right to receive the sums stipulated in the contract as reimbursement * * *." (emphasis ours)

*State of Nebraska v. State of Wyoming*, 325 U. S. 589, 613-614, 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);

*Ickes v. Fox*, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

**C. An Action to Determine Whether Water Rates Charged by the Bureau of Reclamation Are Reasonable or Unreasonable, Illegal or Arbitrary, Is Not a Suit Against the United States.**

The Court below ruled as follows:

"* * *. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the United States * * *."

*State v. Rank*, 293 F. 2d 340, 352 (1961).

It is submitted that this part of the decision of the Court below is in error since under the decisions of this Court an action to determine whether water rates charged by the Bureau of Reclamation are reasonable or unreasonable, illegal or arbitrary, is not a suit against the United States.

*Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

*Yuma County Water Users' Ass'n v. Schlecht*, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

*United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

*Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1911);

*Shaughnessy v. Pedreiro*, 349 U. S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955);

*Work v. Louisiana*, 269 U. S. 250, 46 S. Ct. 92, 70 L. Ed. 259 (1925);

"* * *. The questions whether or not the *charges* alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Interference With Rights.

"A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, *is not a 'suit against the United States'*, nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, * * *." (emphasis ours)

*Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 F. 72, 73 (8th Cir.) (1914).

*Swigart v. Baker, supra,* was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

> "(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."
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> *Baker v. Swigart,* 196 F. 569, 571 (1912).

*This Court* affirmed this judgment of the District Court in the above-entitled case, we quote:

> "The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."
>
> *Swigart v. Baker,* 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

*Yuma County Water Users' Ass'n v. Schlecht, supra,* was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project against "local officials of the Yuma Project of the United States Reclamation Service" (*Yuma County Water Users' Ass'n v. Schlecht,* 275 F. 885

(9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

1. **Overruling the Decision of the Lower Court and Affirming the Decision of the District Court Cannot Possibly Cost the United States Money and May Increase Its Income From the Central Valley Project.**

In the first place it can be pointed out that if the higher rate of $10.00 per acre-foot (not for municipal water, but only for Class 1 *irrigation* water) was illegal and unreasonable as found by the District Court and that $3.50 per acre-foot (not for municipal water with municipal priority but strictly irrigation water) was the legal charge as found by the District Court for this water then, since the government is only entitled to the legal charge if they received the legal charge to which they are entitled, and not the higher illegal charge to which they are not entitled, they could not possibly deplete the treasury.

Moreover, as heretofore shown, the Bureau only admitted that they would only give Class I *irrigation* water to the City of Fresno if forced to give any water to the City by court order.[107] They did not

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[107] "The Witness: Your Honor, the operation studies that have been made * * * and as they were originally presented to the various irrigation districts included *Class I water* in an amount of 800,000 acre-feet and the United States can contract Class I water up to that quantity *without infringing* upon the water supply from the project to the various districts that we *now have contracts with or contemplate* contracting with. There is approximately 50,000 acre-feet of water that could be made available. (To Fresno.)

"The Court: Where?

"* * *

"The Witness: In Millerton Lake, your Honor." (emphasis ours)

R. 1983, Testimony of Leland K. Hill, Rep. Tr. 15,[illegible]1.

"* * *. For this purpose we are prepared to recommend to

offer the City of Fresno *municipal water* with municipal or domestic priority as they had contracted to sell to the City of Sacramento out of the Central Valley Project.[108] This Class I irrigation water was and still is being sold by the Bureau to the respondent districts for $3.50 per acre-foot (*Rank v. (Krug) United States,* 142 F. Supp. 1 (1956).) If this Court should overrule this decision of the Court below and affirm that part of the decision of the District Court requiring the respondent officials to furnish Fresno with all needed water before exporting San Joaquin River water out of the county and watershed of origin to the respondent districts (*Rank v. (Krug) United States,* 142 F. Supp. 1 (1956)), but at the same time sustained the decision of the Court below that the respondents could charge $10.00 per acre-foot for this

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the Department a contract to furnish to the City up to 60,000 acre-feet for water to be made available from the Millerton Lake Supply, *subject to sharing deficiencies* on the same basis as *class 1 water* users in the service area share deficiencies in extremely dry years.

"* * *

"Sincerely yours,
H. P. DUGAN (Signed)
H. P. DUGAN
Regional Director" (Emphasis ours.)

Letter from H. P. Dugan, Regional Director of Bureau of Reclamation, Region 2, December 3, 1959.

[108]The City of Sacramento recently signed a contract with the Bureau of Reclamation purchasing water out of the Sacramento River for $9.00 an acre-foot containing the following provision:

"City water to be delivered to the City under this contract shall carry all priorities accorded to or for municipal uses under the laws of the State of California and the United States will recognize such priorities."

Minutes of the City of Sacramento, pages 280, 281, Volume 61 of Proceedings of the City Council—1957, dated the 27th day of June, 1957.

Class I irrigation water to the City of Fresno, the United States then would receive $6.50 an acre-foot more for this Class I irrigation water delivered to the City than they could by delivering it to the respondent districts for $3.50 per acre-foot.

On the other hand if this Court reversed the Court below and affirmed the decision of the District Court that any charge in excess of the charge for Class I irrigation water ($3.50 per acre-foot) was unreasonable and then allowed the City of Fresno all of the water it needed at $3.50 per acre-foot before taking any water out of the county of origin of the San Joaquin River as decreed by the District Court, the United States would still receive $3.50 per acre-foot for this additional water delivered to the City of Fresno —the same price they are receiving from respondent district. Thus the United States could in no way suffer financial loss if it reversed the Court below and sustained the decision of the District Court.

In any event, as shown by *Swigart v. Baker, supra,* and *Yuma County Water Users' Ass'n v. Schlecht, supra,* the federal courts have the power to decide whether a charge for water from a reclamation project is legal or illegal and unreasonable and that ends the matter where the District Court's finding on unreasonableness has never been attacked.

### D. The Finding of the District Court That Any Charge in Excess of Class I Irrigation Water to the City of Fresno ($3.50 Per Acre-Foot) Is Unreasonable Must Stand.

Having shown that the determination of whether a water rate under a reclamation project is reasonable or unreasonable is strictly a judicial determination, and having shown that an action to make such a determination is not a suit against the United States, we should now point out that since there was no designation in their points on appeal nor any appeal by any respondent in the Court below from the holding of the District Court that any charge to the City of Fresno in excess of the Class I irrigation rate ($3.50 per acre-foot) was unreasonable. This portion of the District Court's opinion should stand. *Jesionowski v. Boston & M. R.R.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947). *State of Washington v. United States*, 214 F. 2d 33 (9th Cir.) (1954). The Court below also made a general affirmal of this portion of the decision of the District Court.

Neither was any point raised upon this part of the decision of the Court below by any respondent in their petitions for certiorari under Rule 23(c) of this Court. It is therefore respectfully submitted that this holding of the District Court must stand.

We will therefore not go into the testimony of the other parties such as the testimony of plaintiff's engineer Lee that $1.50 per acre foot was a reasonable price to be charged the City of Fresno[109] nor compare the charge of 25¢ per acre foot charged the Los Angeles

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[109]R. 295 Deft. Ex. A-79-A and Rep. Tr. 21,975.

Metropolitan Flood Control District for storage of water at Boulder Dam.[110-111]

**E. Respondent Bureau of Reclamation Officials Are Attempting to and Are Illegally Making a Huge Profit From the Operation of the Central Valley Project and From Municipal Water Offered Appellant City of Fresno, in Violation of the Acts of Congress Authorizing Reclamation Projects in General and the Central Valley Project in Particular.**

**1. History of Repayment Provisions for the Reclamation Laws of the United States. No Profit Is to Be Made From the Operation of These Projects.**

As heretofore shown, illegality constitutes unreasonableness. We now will show that the Bureau is making an erroneous illegal profit from the project.

Congress, on June 17, 1902, (32 Stat. 388) under the leadership of President Theodore Roosevelt, adopted its first Reclamation Act.

This act provided for the construction of reclamation projects in the sixteen western states to be financed by the sale of public lands in these sixteen states, the proceeds from the sale of said lands to be paid into a reclamation fund from which authorized reclamation projects were to be paid. The projects were to repay to the reclamation fund the cost of construction of the project together with the cost of operation and maintenance of the project during the re-

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110-111 "(10) A charge of twenty-five cents ($0.25) per acre-foot shall be made for water delivered to the District hereunder during the Boulder Dam cost repayment period."

United States Department of the Interior Bureau of Reclamation, Boulder Canyon Project Final Reports, Part 1—Introductory, Bulletin 2, "Hoover Dam Power and Water Contracts," page 52.

payment period without profit. This clearly appears from the decisions of this Court.

> "The official records show that in 1902 there were in sixteen states and territories 535, 486, 731 acres of public land * * *. A large part of this land was arid * * * with a view therefore of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of public lands in those sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works—the cost of each project to be assessed against the land irrigated and as fast as the money was paid by the owners back into the trust it was again to be used for the construction of other works * * *.
>
> "The general outline of this plan was approved by Congress, which, on June 17, 1902 (32 Stat. 387 at L. 389, Chap. 1093) passed 'An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands'."
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> *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 646, 57 L. Ed. 1143 (1912).

**2. Congress Specifically Provided That Each Reclamation Project Was to Repay to the Reclamation Fund Only the Estimated Cost of the Project Together With the Cost of Operation a Maintenance of the Project Over the Period of Rep nent.**

These reclamation projects, including those providing water to municipalities, were only to be chargeable with two costs of the project: (1) repayment of the es-

timated cost of constructing the project; and (2) the cost and operation of maintenance during the period in which the project was to *be paid for.*[112]

*Referring to the Central Valley Project*, this Court makes the following pertinent ruling, clearly indicating there was to be no profit made out of the construction and operation of the Central Valley Project but that the Project should only "recoup its cost".

> "This project anticipates recoupment of its cost over a 40-year period."
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> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 752, 70 S. Ct. 955, 969, 94 L. Ed. 1231 (1950).

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[112] "The Statute provides that the cost of the construction of the project shall be charged against the lands within the irrigable limits. The phrase is not expressly defined, and being general by its terms, is not necessarily limited to building, but may include the preservation and maintenance of what has been built."

*Swigart v. Baker, supra*, page 646.

"In pursuance of this act, various works, * * * were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance, and operation making up the total. After 1906, the charges were separately stated substantially thus: '1. For building, $..... per acre; 2. For maintenance and operation, $..... per acre per annum.'"

*Swigart v. Baker, supra*, page 647.

"* * *. The Reclamation Act sets aside all money received from the sale and disposal of public lands in certain states and territories named for the reclamation of the arid lands therein; and this fund is to be kept intact as nearly as possible, by collecting from the water users under each project the *estimated cost of construction thereof.*" (emphasis ours)

*Yuma County Water Use. Ass'n v. Schlecht*, 262 U. S. 178, 143, 43 S. Ct. 498, 500, 66 L. Ed. 799 (1922).

"In the case of *Yuma County Water Users Association v. Schlect*, 9 Cir. 1921, 275 F. 885, 888, the court held that the term 'by estimated cost' is not meant the actual exact final sums paid for construction but rather such sums as it is believed after careful computation will cover the expenses directly and fairly connected with the construction of the project."

*Indiana Gas and Water Co. v. Williams*, 175 N. E. 2d 31, 33 (1961).

**3. Repayment of Each Reclamation Project Was to Be Based on the Estimated Construction Cost, Not the Actual Construction Cost, of the Project, Together With the Cost of Operation and Maintenance.**

As shown in the decisions of this Court, repayment of each reclamation project was based not on the final actual cost but on the *estimated cost of the project,* together with the cost of operation and maintenance.[113]

This Court cited with approval the Feasibility Report that the estimated cost of construction of the Central Valley Project is $170,000,000; that the annual cost over the 40-year period including all charges would be $7,500,000.

> "Footnote 21. * * * The estimated cost of construction is $170,000,000 and the annual cost, including repayment of all other charges is $7,500,000."
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> *United States v. Gerlach Live Stock Co.,* 339 U. S. 775, 762, 70 S. Ct. 955, 969, 94 L. Ed. 1231 (1950).

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[113] "* * *; these charges to be determined with a view of returning to the reclamation fund the *estimated cost* of the construction of the project, * * * and all moneys received from the above sources shall be paid into the reclamation fund." (emphasis ours)

*Swigart v. Baker, supra,* 647.

"The Reclamation Act sets aside all money received from the sale and disposal of public funds in certain states and territories named for the reclamation of the arid lands therein and this fund is to be kept intact as nearly as possible by collecting from the water users under each project the *estimated cost of construction thereof.*" (emphasis ours)

*Yuma County Water Users' Ass'n v. Schlecht,* 262 U. S. 138, 43 S. Ct. 498, 66 L. Ed. 799 (1922).

"The extent to which the fund will be preserved will depend upon the accuracy of the estimate."

*Yuma County Water Users Ass'n v. Schlecht, supra.*

**4. As Between the Various Class of Water Users Under a Reclamation Project Each Class Was to Be Charged an Equitable Share of the Total Cost of the Project Devoted to Each Class of Water Users Together With an Equitable Proportion of the Operation and Maintenance Cost.**

As shown by the decisions of this Court, the cost of the project to each class of users should be apportioned equitably.

> "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of * * * the project, and shall be apportioned equitably * * *." (emphasis ours)
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> *Yuma County Water Users' Ass'n v. Schlecht*, 275 F. 885, 888 (1921).

**5. In 1906 Congress Specifically Authorized the Furnishing of Municipal Water From Reclamation Projects to Cities Within the Immediate Neighborhood of Any Reclamation Project Such as Fresno.**

Fresno lies within a few miles of Friant Dam and the Friant-Kern Canal. It is clearly within the immediate vicinity of the Central Valley Project.

Congress, by the Act of April 16, 1906, 34 Stat. 116, 117, specifically authorized the furnishing of municipal water from reclamation projects to cities within the "immediate vicinity of any reclamation project."[114]

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[114]"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, *and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects*, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same

and specifically provided that rates for municipal water should not be lower than that charged for agricultural water, clearly indicating that Congress did not intend that cities pay more for municipal and domestic water than irrigation water. This clearly indicates that it was not the intention of Congress that the cities were to pay more than the agricultural rate.

In 1935, when Congress approved the Central Valley Project based on the Feasibility Report signed by President Franklin Delano Roosevelt December 2, 1935, Congress expressly provided that water from the Central Valley Project was to supply both municipal and industrial uses. (Feasibility Report, December 2, 1925, Appendix D.)

The Act of August 26, 1937, 50 Stat. 844, expressly provided that the Central Valley Project should furnish *domestic* water. The Central Valley Project Act of August 26, 1937 providing that the Central Valley Project was to furnish both an irrigation and *domestic* supply has been reauthorized by Congress on at least three other occasions: Act of October 17, 1940, 54 Stat. 1198; Act of October 14, 1949, 63 Stat. 852; Act of September 26, 1950, 64 Stat. 1036.

**6. In 1939 Congress Authorized an Additional Municipal Charge, to Wit: Interest Not to Exceed 3½ Percent on the Portion of the Project to Municipalities.**

From 1902 until 1939 municipalities were charged two things under a reclamation project: (1) an equitable share of the cost of construction of that portion

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to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." (emphasis ours)

Act of April 16, 1906, 34 Stat. 116-117.

of the project devoted to municipal water supply; and (2) an equitable proportion of the cost of operation and maintenance of that part of the project devoted to municipal use.[115]

In 1939 Congress specifically added a third charge and allowed the Department of the Interior to charge interest on *municipal water* and the equitable proportion of the project devoted to municipal water supply.[116]

By specifically referring to interest in the 1939 Statute, Congress, by inference, prohibited any other charge to municipalities other than interest not to exceed 3½ percent in addition to the charge for an equitable allocation of the construction cost of the project and an equitable charge for the cost and maintenance of that portion of the project devoted to municipal use.

"Generally a legislative affirmative description implies denial of nondescribed powers." (Syllabus)

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[115]"The official reports show that in 1902 there were in sixteen states and territories 535,486,731 acres of public land * * *. A large part of this land was arid * * *. With a view therefore of making those arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works,—the cost of each project to be assessed against the land irrigated and as fast as the money was paid by the owners back into the trust it was again to be used for the construction of other works * * *."

"The general outline of this plan was approved by Congress which on June 17, 1902 (32 Stat. at L. 389, Chap. 1093) passed 'An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of arid lands.'"

*Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 646, 57 L. Ed. 1143 (1912).

[116]Act of August 4, 1939, 53 Stat. 1187, 1194.

*Continental Casualty Co. v. United States*, 314 U. S. 527, 62 S. Ct. 393, 86 L. Ed. 426 (1942)

The Secretary of the Interior and the Chief of the Bureau of Reclamation set an interest charge on the proportion of the construction costs allocated to municipal water under the Central Valley Project which in 1952 was fixed at 2½ percent[117] at which time all of those features of the Central Valley Project involving the San Joaquin Valley, the City of Fresno and this case had been contracted for if not completed.

**7. The Bureau of Reclamation Is Making Huge Profits Out of the Operation of the Central Valley Project.**

On June 23, 1962, according to the Associated Press releases from Colorado Springs, Colorado, Reclamation Commissioner, Floyd E. Dominy, admitted that the Bureau will have $200,000,000.00 in surplus revenue or profit in the payout period of the presently authorized Central Valley Project.[118]

The University of California, in a report prepared for the Assembly Interim Committee of the State of California (1955), estimated that the Central Valley Project at that time (1955) if no further units were added would have "an excess of revenue over construction costs over $221,619,800.00 available for payment of interest and for surplus", which would lead to "a prospective project surplus of $179,727,900.00"

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[117] 2½ percent in 1954. (Footnote 10. U. S. Bureau of Reclamation. Region 2, *Central Valley Project Repayment Analysis* (November 25, 1952).

[118] Associated Press Release of Reclamation Commissioner Floyd E. Dominy, June 23, 1962. Appendix "G" hereof. The court can take judicial notice of public statement of officials.

in the year 2005 if present project is continued to that date.[119]

It is submitted that since the contract price of municipal water to Fresno is still open that no profit should be charged other than interest as authorized under the Act of August 4, 1939, to the City of Fresno and that any such charge of profit would be illegal and in excess of the authority conferred upon respondents.

**8. The Use of Profit From Municipal Water to Reduce the Rates of Agriculture Is Illegal.**

As has been shown, there is no provision in any act of Congress authorizing any charge for municipal water other than for repayment for the equitable proportion of the estimated costs of construction and the equitable proportion of the cost of operation and maintenance of the project together with an interest component not to exceed 3½% per annum which in fact has been only 2% to 2½% per annum as fixed by the Secretary.[120] It has also been shown that in view of the affirmative legislative description of what might be charged, there is an implied denial of undescribed powers to the Respondent Bureau of Reclamation officials which would include any illegal profit charged. *Continental Casualty Co. v. United States,* 314 U. S. 527, 62 S. Ct. 393, 86 L. Ed. 426 (1942).

However, the respondent officials in their public bulletins admit that they are making a profit in addition

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[119]Central Valley Project: Federal or State? Report Prepared for Assembly Interim Committee on Conservation, Planning and Public Works, House Resolution No. 177, 1953, page 82.

[120]2½ percent in 1954. (Footnote 10, U. S. Bureau of Reclamation, Region 2, Central Valley Project Repayment Analysis (November 25, 1962).)

to the interest, construction cost and cost of operation and maintenance for municipal water in the Central Valley Project and using this to illegally reduce the price of agricultural water.[121]

It is submitted that this illegal activity of the Bureau of Reclamation in the Central Valley Project is illegal and respondents in so making such illegal profits are exceeding the authority conferred upon them by the acts of Congress. We would appreciate a ruling by this Court on this important point which is so important to the cities of California and the nation.

It is submitted that the same argument could also be made that municipalities should share in commercial power sales revenues.

It is also submitted that a definition by this Court of what constitutes "municipal water" determining whether such a term means simply Class I irrigation water sold to cities or whether it means water with municipal priorities in time of shortage would be helpful.

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[121] "* * *. It is contemplated that the net revenues from commercial power and municipal and industrial water in excess of that required for repayment of the allocation of these functions and the interest component from power and municipal and industrial water will be applied in the repayment of project costs allocated to irrigation * * *."

Repayment Histories and Payout Schedules, 1952, Second Edition, United States Department of the Interior, Bureau of Reclamation, p. 39.

"The amount of financial assistance by municipal and industrial water is the net revenue available after the retirement of the M & T investment. This amount is applied toward repayment of the irrigation plant investment annually as it becomes available."

Repayment Histories and Payout Schedules, 1952, Second Edition, United States Department of the Interior, Bureau of Reclamation, excluding Trinity River Division.

It is further submitted that any interest charge if allowed on the cost allocated to water for municipalities should go back to the reclamation fund or the federal treasury and not used to assist agricultural repayment as was done from 1944 to 1952.

We submit that the following statement of the California Water Rights should govern here,

> "Here, the Federal Government makes no claim that it is operating or *proposes to operate the Central Valley Project for the benefit of the Federal Treasury* but rather, precisely as was proposed by the Water Project Authority which originally comtemplated its construction and operation '* * * in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions * * *' (Water Code, Sec. 11126). The State authorization of the project in 1933 (Stats. 1933, Chapter 1042) has from time to time been refined and added to by amendments but except for additional units, remains essentially as it was in the beginning." (emphasis ours)
>
> State of California, State Water Rights Board Decision D 935, June 2, 1959, page 92.

**F. The United States Has Waived Its Immunity to Suit. The Court Below Is in Error in Holding That This Suit Could Not Be Maintained as a Class Action Suit Against the United States Merely Because Several of the Named Plaintiffs in the District Court Had Very Small Amounts of Prescriptive Rights and That the Rights of All Parties Had Not Been Ruled on by the District Court.**

Even if we should assume that the United States was an indispensable party and that this is a suit against the United States — something we feel we have shown in the preceding chapters to be untrue — nevertheless, even in that event the United States has waived its immunity to suit under the Act of July 10, 1952, 66 Stat. 516, and other acts and the present action can therefore be maintained.

The Court below conceded the possibility that plaintiffs holding riparian and overlying percolating water rights might represent a class action suit under the Act of July 10, 1952, 66 Stat. 516, against the United States. We quote:

> "It may well be that those claiming riparian and overlying rights could properly be treated as a class, * * *."
>
> *State of California, United States of America, v. Rank*, 293 F. 2d 340, 348 (1961).

However, the Court below erroneously held that merely because several of the named plaintiffs had very small amounts of prescriptive and appropriative rights that this suit could not be maintained as a class action against the United States under the waiver of immunity.

"(3) These plaintiffs, as claimants of appropriative or prescriptive rights, cannot however, speak for others 'similarly situated.'"

*State of California, United States of America v. Rank*, 293 F. 2d 340, 348 (1961).

The Court below also erroneously ruled that all necessary parties were not joined.

"In two respects we feel that it has failed to measure up. First, all claimants have not been joined."

*State of California, United States of America v. Rank*, 293 F. 2d 340, 348 (1961).

Neither of these rulings are correct as will now be shown.

However, before we discuss these two points we feel that we should, for the convenience of the Court, quote the statute in question and briefly discuss the applicability of waiver of immunity statutes.

(a) *The Waiver of Immunity to Suit Under the Act of July 10, 1952, Should Be Liberally Construed.*

The Act of July 10, 1952, 66 Stat. 560, reads as follows:

"Suits for Adjudication of Water Rights — Joinder of the United States as defendant: Costs:

"Sec. 208. (a) Consent is * * * given to join the United States as a defendant in *any suit* (1) for the adjudication of rights to the use of water of a river system or * * * (2) for the administration of such rights where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law by purchase, by exchange, or otherwise, and the

United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

Act of July 10, 1952, 66 Stat. 560 (43 U. S. C. A. Sec. 666).

Where Congress gives a broad waiver of immunity of the United States from suit as here by the use of the words *"any suit,"* the statute should be liberally construed.[122]

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[122] * * *. As applied to the State of New York Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the State, having consented to be sued, should thus paralize the remedy' * * * 243 N. Y. at 147, 153 N. E. at 29. 'A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen * * *. When authority is given, it is liberally

The courts by refinement of construction should not destroy the citizen's right to sue.[123]

There should be no resort to the legislative history of the enactment of statutes, if the language of the statute is plain and unambiguous, as here, where the statute refers to "any suit", since such legislative history may only be resorted to for the purpose of solving doubt, not for the purpose of creating it.[124]

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construed.' United States v. Shaw, 309 U. S. 495, 501, 60 S. Ct. 659, 661, 84 L. Ed. 888."

*United States v. Yellow Cab Co.*, 340 U. S. 543, 554, 71 S. Ct. 399, 406, 95 L. Ed. 523 (1951).

"(Sovereign) immunity * * * undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of government and to confirm Mailland's belief expressed nearly fifty years ago, that 'it is a wholesome sight to see' 'the Crown' sued and answering to its torts."

*Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 723, 69 S. Ct. 1457, 1478, 93 L. Ed. 1628 (1949).

[123]"* * *. In argument before a number of District Courts and Courts of Appeal, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Constr. Co., 243 N. Y. 140, 147, 153 N. E. 28, 29-30: *'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'* " (emphasis ours)

*United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366, 383, 70 S. Ct. 207, 216, 94 L. Ed. 171 (1949).

[124]"Although, of course, there should be no resort to the legislative history of the enactment of statutes, if the language of the statute is plain and unambiguous, as here, since such legislative history may only be resorted to for the purposes of solving doubt, not for the purpose of creating it."

*Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311 (1929);

*Russell Motor Car Co. v. United States*, 261 U. S. 514, 43 S. Ct. 428, 67 L. Ed. 778 (1923).

(b) *The Present Action Clearly Comes Within the Term "Any Suit."*

"Statutes should be construed according to the plain obvious meaning of the Statute."

*Lynch v. Alworth Stephens Co.*, 267 U. S. 364, 45 S. Ct. 274, 57 L. Ed. 660 (1925).

Said Chief Justice Marshall in *Cohens v. Commonwealth of Virginia*, 19 U. S. 264, 6 Wheat. 264, 405, 5 L. Ed. 257 (1821): "What is a suit. We understand it to be prosecution or pursuit of some claim, demand or request; in law language, it is the prosecution of some demand in a *court* of justice." Speaking also in *Weston v. City Council of Charleston*, 27 U. S. 449, 2 Pet. 249, 7 L. Ed. 481 (1920) he said: 'The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a *court* of justice, by which an individual pursues that remedy in a *court* of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a *court* of justice, the proceeding by which the decision of the court is sought, is a suit."

In *Ex parte Collet*, 337 U. S. 55, 58, 69 S. Ct. 944, 946, 93 L. Ed. 1207 (1949), "*any* civil action" includes *pending* actions.

"* * * any * * * us used in its broadest and fullest form without qualification or exception."

*Richardson v. Ainsa*, 218 U. S. 289, 31 S. Ct. 23, 54 L. Ed. 1044 (1910).

"Any has the meaning of 'all'."

3 C. J. 232.

"'Any cause or matter' is intended to cover every proceeding of whatever character in any court, of whatever kind. * * *."

3 C. J. 235, Note 72(a).

As correctly held by the Court below and the District Court this suit involves conditional injunctive decrees known as a physical solution, which conditional injunctive decrees have long been recognized as within the destination of "suits" in this and other federal courts.

In essence a decree of physical solution is but the conditional injunctive decree of a court of equity.

This Court has approved the conditional injunctive decree known as a physical solution as a proper "suit" on a case involving the Central Valley Project.[125]

(c) *Effect of Other Statutes.*

In construing the Act of July 10, 1952, 66 Stat. 560, we should look at other similar statutes.[126]

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[125] "* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory* that he find some physical solution, at his expense, to preserve existing prior rights, * * *. Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P. 2d 486; City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 60 P. 2d 439; Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 76 P. 2d 681; City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585; Los Angeles Flood Control District v. Abbot, 24 Cal. App. 2d 728, 76 P. 2d 188.

"It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a *physical solution* as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the rights to so much of the water they had formerly received as they could beneficially use." (emphasis ours)

*Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, 81, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

[126] "In Keifer & Keifer v. Reconstruction Finance Corporation, 1939, 306 U. S. 381, at page 394, 59 S. Ct. 516, at page 520, 83 L. Ed. 784, the Court held with relation to the waiver-of-immunity statute concerning the Reconstruction Finance Corpora-

One such statute is the Basic Reclamation Act of July 17, 1902, 32 Stat. 388, as amended which reads as follows:

> "Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the *Secretary of the Interior*, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *." (emphasis ours)
>
> Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. 391.

Mr. Justice Douglas and Mr. Justice Black in their concurring opinion in *Gerlach Live Stock & Cattle Co. v. United States* held the Act of June 17, 1902, had waived the immunity of the United States on reclamation projects.[127]

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tion, that in ascertaining the Congressional will, the Court was not limited to the single statute, and said, to do so 'is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.'"

*Rank v. (Krug) United States*, 142 F. Supp. 1, 81 (1956).

[127]"Congress to be sure, has full power to relinquish its immunity from suit for the taking. See Ford & Son v. Little Falls Fibre Co., 280 U. S. 369, 377, 50 S. Ct. 140, 141, 74 L. Ed. 483; United States v. Realty Co., 163 U. S. 427, 440, 16 S. Ct. 1120, 1125, 41 L. Ed. 215. And I think *it has done so*—not by the Acts appropriating funds for the project but *by the Reclamation Act* of 1902, 32 Stat. 388, 43 U. S. C. 371 *et seq.* * * *.

"The Act applies solely to the 17 western States. It deals with reclamation projects as its title indicates. The Central Valley Project is such a project." (emphasis ours)

*United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 757, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

It is submitted that if the immunity of the United States was waived so far as damages are concerned, since the Basic Reclamation Act of 1902 makes the Bureau of Reclamation subject to all state laws—which would include the injunctive processes of the courts—the immunity must have been waived as regards an equitable suit like the present one.

(aa) The Decision of the California Water Rights Board of June 2, 1959.

Appellant City of Fresno in its complaint in intervention had asked for an adjudication in the District Court of the priority of appellant City of Fresno's filings to appropriate water of the San Joaquin River over those of the United States [R. 182-1] (*Rank v. (Krug) United States,* 142 F. Supp. 1, 121 (1956). The District Court held that the State Administrative Agency must first pass on that and allowed them to do so. This agency, then the State Engineer, is now the California Water Rights Board.

After general advertising as required by Section 1300 to 1316 of the California Water Code and Section 712, Article 11 of the California Administrative Code by the California Water Rights Board, all parties to this action including the City of Fresno, the United States and every respondent irrigation district appeared before the State Water Rights Board. The State Water Rights Board denied the application of the City of Fresno to appropriate water and granted those of the United States with certain reservations but made the whole decision subject to final decision *in this case.* Although by statute the United States could petition the California courts for a review of this decision (Sec. 1094.5 California Code of Civil Procedure; the *Times-*

*cal Case*, 44 C. 2d 90, 280 P. 2d 1 (1956)), it did not do so. The City of Fresno petitioned for a review but dismissed its application with prejudice. We submit then that the matter of the waiver of immunity of the United States and the jurisdiction of this Court over the United States is *res adjudicata* as against all parties. (*Goodspeed v. Great Western Power Co.*, 33 C. A. 2d 245.)

The Court below in support of its ruling that the United States has not waived its immunity to suit, quotes *Miller v. Jennings*, 243 F. 2d 157, 159 (5th Cir.) (1957), a decision with a dissenting opinion.

The above case is clearly distinguishable by the fact that only three irrigation districts were involved in that action and in which action the United States was a party—and of these one district, the largest, The Elephant Butte Irrigation District, lying upstream from the other two districts, *was completely left out of the suit*, and all interested parties and every parcel of land were not represented as here nor was there any such proceeding after advertisement as we had before the Water Rights Board here. Moreover, the State of Texas was not a party to the suit as was the State of California in this case, which entered this suit stating "the state appears in its sovereign governmental and proprietary capacities, in its own interest and for the protection of its own rights; also as *parens patriae*, in the interest of and for the protection of all its citizens, residents, land owners and water users and its agencies"[128] and asked a physical solution of the rights of all parties and of all its citizens and land owners.

[128] R. 88, State of California's Amended Complaint in Intervention.

(d) *The Court Below Erroneously Held That the Named Plaintiffs Could Not Maintain This Suit as a Class Action Against the United States Because a Few of Them Had Infinitesimal Amounts of Prescriptive and Appropriative Rights.*

The Court below held that this action could not be maintained as a class action suit against the United States under the waiver of immunity Act of July 10, 1952, merely because some of the named plaintiffs had a small amount of prescriptive water rights.

> "(3) These plaintiffs, as claimants of appropriative or prescriptive rights, cannot, however, speak for others 'similarly situated.'"
>
> *State of California, et al. v. Rank*, 293 F. 2d 340, 348 (1961).

In the first place the District Court held that this was a proper class action. The discretion of the trial Court in this regard should not be reversed except for abuse of discretion.[129]

The Court below then reversed the trial Court, holding that the inclusion of these named plaintiffs having an infinitesimal amount of prescriptive and appropriative rights prevented the operation of the waiver of immunity statute — the Act of July 10, 1952, 66 Stat. 560.

However, these prescriptive and appropriative rights of these six named plaintiffs were so small and infinitesimal that they are not grounds for reversing the Dis-

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[129] "The district court has a discretion with respect to whether an action may be maintained as a class action and in a proper case the exercise of that discretion may not be disturbed by an appellant court except for abuse. F.R.C.P. rule 23, 28 U. S. C. A. following Section 723c. (Syllabus)

*Weeks v. Barcco Oil Co.*, 125 F. 2d 84 (1941).

trict Court. They amounted to only 14.63 second-feet of the flows of the San Joaquin River of 40,000 second-feet. The Assistant Attorney General of the State of California in his letter to the Court below described these prescriptive and appropriative rights of the named plaintiffs as "de minimis."[130]

> "The total, 6475 gallons per minute, is but 14.43 cubic feet per second. This would seem to be a *de minimis* amount in view of the relative volumes involved in this case."
>
> R. 363 (New Volume), Letter by B. Abbott Goldberg.

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130 "IN UNITED STATES DISTRICT COURT
STATE OF CALIFORNIA
Office of the Attorney General
Department of Justice
State Building, San Francisco 2

December 27, 1960

"Frank H. Schmid, Esq.,
Clerk, U. S. Court of Appeals,
Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California.

Dear Mr. Schmid:

Re: California et al. v. Rank et al., No. 15840

"This is in response to the court's inquiry set forth in your letter of December 15 to Mr. Rowe.

"The appropriative and prescriptive rights, as distinguished from riparian rights, involved in the court's inquiry of December 15, 1960, are:

| Record | Name | Gallons per Minute | Date | Precriptives or Appropriative |
|---|---|---|---|---|
| 962 | Folsom | 1400 | 1909 | A & P |
| 967 | Cobb | 1000 | 1927* | P |
| 970 | Cobb | 1025 | 1938* | P |
| 974 | Cobb | 1025 | 1928* | P |
| 976 | Sims | 1000 | 1902* | A & P |
| 978 | Sims | 1025 | 1927* | P |

*Stated in terms of years prior to filing the action. The action was filed on September 25, 1947, R. 78."

R. 362 (New Volume), Letter by B. Abbott Goldberg.

De minimis is defined by Webster's New International Dictionary as follows:

> "de minimis * * * Law. The law takes no account of trifles; — a maxim applicable to cases where it is impracticable for the law to adjust the rights of parties according to trifling changes or difficulties, as in case of alluvion in the change of a stream's banks, or parts of a day in the ordinary reckoning of time, etc."

Since these rights were therefore trifles and impossible for the Court to consider, this was not ground for reversal.

This Court has many times held that a trial court should not be reversed for immaterial or infinitesimal errors or for immaterial errors.

> "No judgment should be reversed in a court of error, when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was not made."
>
> *Lancaster v. Collins*, 115 U. S. 222; 6 S. Ct. 33, 29 L. Ed. 373, (1885).

> "We do not reverse cases for unsubstantial error. Abstract inerrancy is hardly possible in a trial * * * it is never essential to a valid trial."
>
> *Maryland Casualty Co. v. Reid*, 76 F. 2d 30 (5th Cir.) (1935);
>
> *Anchor Casualty Co. v. McGowan*, 168 F. 2d 323 (1948).

Moreover, the District Court found at least four of the named plaintiffs (Leslie L. Howard, Robert C. Arnold, Henry H. Engelman and Emma Engelman) had no prescriptive or appropriative rights [Findings

10, 11 and 12, R. 817-821], but only riparian and overlying rights; and found that the appellant City of Fresno had overlying rights which the California courts held to be the same or analogous to riparian rights (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 C. 2d 489, 45 P. 2d 972 (1935)). These named plaintiffs were competent to represent the class against the United States. This Court and other federal courts have consistently held that it is possible for only one named plaintiff to represent a class in a class action suit (*Mullaney v. Anderson*, 342 U. S. 415, 72 S. Ct. 428, 96 L. Ed. 458 (1952)).

> "* * * Rule 23, Federal Rules of Civil Procedure 28 U. S. C. A., provides that if persons constituting a class are so numerous as to make it impracticable to bring them all into court, such of them, *one* or more, as will fairly insure adequate representation may sue or be sued. Assuming that defendants' offer of proof in this respect had been received, we hold that this suit was properly instituted as a class action, providing proof shows *one* of the forty-two qualifies to represent the class." (emphasis ours)
>
> *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F. 2d 294, 301 (1951); Cert. denied 342 U. S. 819, 72 S. Ct. 33, 96 L. Ed. 619; Rehearing denied 342 U. S. 889, 72 S. Ct. 172, 96 L. Ed. 667 (1951).

Finally, if there are any other owners of water rights or other parties who should be brought into this case—if any there be—they could easily be ordered brought into this case by this Court at this time. It would be extremely unfair and unjust after the huge expenditure

of time and money in this case to dismiss this suit against the United States and possibly start over again. As was stated by the Supreme Court in *Mullaney v. Anderson, infra:*

> "* * *. To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration * * *."
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417; 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

> "* * *. Rule 21 of F. R. C. P. 28 U. S. C. A. authorizes the addition of parties 'by order of the court on motion of any party or of its own initiative *at any stage of the action* and on such terms as are just.'" (emphasis ours)
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

It is therefore submitted that the first reason given by the Court below for holding that the named plaintiffs could not represent the class action is in error and that the immunity of the United States under the Act of July 10, 1952, 66 Stat. 560, had not been waived in this case was clearly in error.

(e) *The Finding of the Court Below That All Claimants were Not Joined in this Action Is in Error.*

The Court below held:

> "The question remains whether the suit at bar was for such a general adjudication of a river system as was contemplated by Congress.
>
> "In two respects we feel that it has failed to measure up. First, all claimants have not been joined."
>
> *State of California, United States of America v. Rank*, 293 F. 2d 340, 347-348 (1961).

In the first place it will be observed that the Court overlooked the words "or other source" in the Act of July 10, 1952. Friant Dam is clearly such "other source" in this action. It will be remembered that no water was to be allowed to flow below Gravelly Ford Canal.

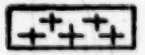
The United States except for the water in Mendota Pool (including water from the pool) for which the Central Valley Project provided an exchange and substitute of the waters from the Sacramento River by means of the Delta-Mendota Canal, had taken either by eminent domain or condemnation all rights below Gravelly Ford Canal. The United States was therefore the only necessary party below Gravelly Ford Canal.

The water of the San Joaquin River out of Friant was to go to the districts along the Madera and Friant-Kern Canals, the City of Fresno and the riparian landowners between Friant Dam and Gravelly Ford Canal.

> "9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) to satisfy riparian rights between Friant and Gravelly Ford; * * *." (emphasis ours)
>
> *Wolfsen v. United States*, 162 F. Supp. 403, 411 (1958).

All the respondent irrigation districts having contracts to water from Friant Dam were parties to this action. As the Bureau granted new contracts to districts or

other parties, the plaintiffs in the District Court moved to join in such other districts or others receiving contracts as party defendants. Thus, on July 27, 1954, plaintiffs moved to add Pacific Gas & Electric Company, a corporation, Consolidated Irrigation District, a public corporation, and International Water District, a public corporation. Judge Hall granted the Motion to join these districts. The Consolidated Irrigation District had only a temporary contract for one year and filed a disclaimer in the action.

As regards those owners claiming water rights in the San Joaquin River between Friant Dam and Gravelly Ford their rights consisted of three types: (1) Roughly 42 of these owners had purchased their lands from Miller & Lux under which contracts to purchase Miller & Lux retained the water rights and as stated they are shown on Defendants' Exhibit A-9-A-1 [R. 2340, Rep. Tr. 13,361] with the following designation:  . These reserved rights were found by the District Court to have been purchased by the government from Miller & Lux under the Purchase Agreement dated July 27, 1939 [Deft. Ex. A-48-A, Rep. Tr. 17,602]; (2) 101 owners of lands along the river between Friant Dam and Gravelly Ford who had executed contracts for the purchase of their water rights by the United States are designated on Defendants' Exhibit A-9-A-1 as follows  ; (3) the balance of these holdings, consisting of 57 holdings [Deft. Ex. A-9-A-1, R. 2340, Rep. Tr. 13,361], are designated as follows:  have refused to sign contracts with the United States and are either named plaintiffs

or have come into the trial Court and have asked that the plaintiffs be allowed to represent them or are contributors to plaintiffs who are representing them as members of a class.

As the Court will notice on [R. 2340; Deft. Ex. A-9-A-1; Rep. Tr. 13,361], every parcel of land between Friant and Gravelly Ford is set forth and described. Many weeks were spent at the trial in the Court below establishing in detail which parcels were riparian to the river and the rights to each parcel.

The trial Court made findings on the specific rights of each and every one of these 200 holdings, for example: In Finding 18, R. 763, the trial Court listed each parcel whose owners had executed contracts for the purchase of their water rights by the United States.[131]

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[131]"Finding 18. The court finds that at the time of the filing of the above entitled action or during the course of the trial herein, the owners or former owners of those certain lands located in the Counties of Madera and Fresno, State of California, and designated as Parcels 1, 2, 5, 6, 9, 10, 11, 13, 15, 16, 17, 18, 19, 21, 24, 25, 31, 32, 33, 34, 36, 38, 43, 44A, 45, 47, 52, 53, 54, 56, 57, 61, 64, 65, 66, 67, 69, 73, 74, 75, 76, 77, 78, 79, 81, 84, 85, 90, 92, 99B, 102A, 102B, 103, 104, 108, 109, 113, 114, 115, 120, 122, 123, 125, 126, 127, 128, 129, 130, 132, 133, 136, 139, 156, 159, 161, 162, 169A, 169B, 171, 173, 175, 179, 185, 186, 188, 189, 193, 194, 195, 200, 201, 203, 205, 208C, 211, 212, 214 and 215 of Exhibit 1 of these findings had or have executed contracts with the defendant United States of America, for adjustment of water rights appurtenant to said above numbered and described parcels of lands set forth in this finding between Friant Dam and the vicinity of Gravelly Ford, which said contracts contain, among others, the following provisions or 'provisions substantially similar,' affecting the water rights of the owners of said parcels of land in and to the waters of said San Joaquin River."

R. 763, Finding 18.

The Court then made a finding of the specific provisions that these landowners had signed in their contracts involving their water rights.

In Finding 17, R. 752, the Court specifically listed all owners who had purchased their lands from Miller & Lux, Inc., reserving to Miller & Lux their water rights, which rights have since been bought by the United States.[132] Each distinct reservation and water right now owned by the United States and covering these parcels was set out at pages 761 and 762 of the Record. After weeks of testimony the District Court also made findings as to which parcels of land between Friant and Gravelly Ford Canal had riparian water rights.[133]

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[132]"Finding 17. The court finds that those certain lands located in the Counties of Madera and Fresno, State of California, and designated as the following Parcels:

118, 121, 134, 135, 137, 138, 141, 143A, 143B, 144, 146, 148, 151, 154A, 154B, 155, 158, 163, 164, 165, 167, 172, 176, 177, 178, 181, 182, 183, 187A, 187B, 190, 191, 192, 197, 198B, 198C, 199, 204, 206, 207, 209 and 210 * * *."

R. 752, Finding 17.

[133]"Finding 19. The court finds that that portion of the following numbered parcels of lands * * * were at the time of the filing of plaintiffs' complaint at all times mentioned in plaintiffs' complaint as amended and supplemented and now are riparian to said San Joaquin River * * * now are entitled to pump, take and divert waters of said San Joaquin River and use the same on the respective parcels of said lands * * * for present and future beneficial uses upon said lands * * *.

3A, 3B, 4, 7, 8, 12, 14, 20, 22, 23, 26, 27, 28, 29, 30, 35, 40, 41A, 41B, 41C, 42, 48, 49, 50A, 50B, 51, 59, 63, 68, 70, 71, 72, 82, 83A, 83B, 87, 88, 97A, 97B, 100, 101, 106, 131, 140, 145, 147, 149, 150, 152, 153, 157, 160, 168, 208B, 208E, and 208F.

37, 39, 44B, 46A, 46B, 55, 58, 60, 62A, 62B, 80, 86A, 86B, 86C, 89, 91, 93, 94, 95, 96, 98A, 98B, 98C, 99A, 99C, 105, 107, 110, 111, 112, 116, 117, 119, 124, 142, 166, 170A, 170B, 174, 180, 184, 196, 208A, 208D, 208G, and 213."

R. 768, 769, Finding 19.

(f) *If All Necessary Parties Have Not Been Joined, the Appellant Asks This Court for Permission to Join Them at This Time and for an Order to Extend Over Until They Are Joined.*

It is submitted that if all the parties have not been joined that this Court has the power and the duty at this time to allow them to be joined.

> "The propriety of the allowance of an amendment of the complaint pending on appeal is well settled. See Mullaney v. Anderson, 342 U. S. 415, 72 S. Ct. 428, 96 L. Ed. 458."
>
> *United States v. Coson*, 286 F. 2d 453 (9th Cir.) (1961).

> "As the case stands, it is not too late to amend the bill by making the proper parties. The rule in equity permitting it to be done is this: that on the hearing on the cause even upon an appeal *an order may be made for the cause to stand over with the liberty to the plaintiff to amend by ordering proper parties.*" (emphasis ours)
>
> *Lewis v. Darling*, 57 U. S. 1, 16 Howard 1, 14 L. Ed. 819, 822 (1853).

> "Rule 21 of F. R. C. P. 28 U. S. C. A. authorizes the addition of parties 'by order of the court on motion of any party or of its own initiative *at any stage of the action* and on such terms as are just." (emphasis ours)
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

If this Court feels that all of the parties have not been joined in this action who should have been joined, then we ask that the cause stand over and that we be allowed to join them.

(g) *The Court Below Also Erroneously Held That the Rights of the Named Plaintiffs and the Class They Represent Have Not Been Established as Between Themselves.*

The Court below stated the following:

> "* * *, neither the relief prayed for nor the decree includes the establishment of the rights of the claimants as between themselves."
>
> *State of California, United States of America v. Rank*, 293 F. 2d 340, 347-348 (1961).

Although it is submitted that in a class action it is not necessary in the decision to state the rights of the various members of the class as between themselves[134]—that being left for a separate proceeding—the District Court did however determine the rights of the claimants between themselves. The Court as shown by Finding 19, R. 768, 769 and Judgment 23 [R. 837] divided the waters of the San Joaquin River between Friant Dam and Gravelly Ford in accordance with the number of acres of each of the parties of particular crops growing on said acres and in accordance with an allowance for use of water for each acre of crop growing on said lands of the plaintiffs and their class.

The District Court therefore did determine the right to use of water as among themselves when it divides the waters between the owners in accordance with the

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[134]"There is no question but that the amount recoverable by each possible claimant is different, both as to the basic figure of percentage of profit denied them and also as to amount of gasoline sold. This factor is not decisive of a class action.

*Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 91 (1941).

number of acres of particular crops growing on the lands of said owners.[135]

In fact the Court went so far as to divide the domestic use of water between the plaintiffs and the class they represent based upon the number of human beings located on each parcel of land.[136]

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[135]"Finding 23. The court finds that the past, present and future use of the following amounts of water for (1) consumptive use, (2) crop irrigation requirements, (3) farm delivery requirements, (4) effective precipitations, and (5) irrigation efficiency %, within the boundaries of the lands set forth and described in Exhibit 3 hereof (The Lee Line), excepting the lands within Tranquillity Irrigation District, is a beneficial use for agricultural purposes of the water of said San Joaquin River by surface diversion or by pumping underground percolating waters from wells lying within the boundaries of Exhibit 3 of these findings (The Lee Line):

| Crop | Consumptive use | Effective Precipitation Acre feet | Crop Irrigation requirement per acre | Farm Delivery requirement | Irrigation efficiency % |
|---|---|---|---|---|---|
| "Alfalfa | 3.42 | 0.38 | 3.04 | 4.05 | 75 |
| Irrigated pasture | 3.75 | 0.38 | 3.37 | 5.20 | 65 |
| Cotton | 2.38 | 0.38 | 2.00 | 2.85 | 70 |
| Irrigated hay and grain | 1.22 | 0.38 | 0.84 | 1.10 | 75 |
| Truck | 2.30 | 0.38 | 1.92 | 2.85 | 65 |
| Misc. field crops | 1.60 | 0.38 | 1.22 | 1.75 | 70 |
| Deciduous fruit | 2.38 | 0.38 | 2.00 | 2.65 | 75 |
| Citrus & Olives | 2.11 | 0.38 | 1.73 | 2.30 | 75 |
| Grapes | 2.53 | 0.38 | 2.15 | 3.10 | 70 |
| Rice | | | | 6.00 to 7.1 | |

Pre-irrigation by the application of water to land prior to planting is a beneficial use for these crops in addition to the amounts set forth herein."

R. 837, Judgment 23.

[136]"The Court further finds that any use of water by humans for drinking, bathing, household, household garden uses and for evaporative and refrigerated air conditioning and other domestic uses and for manufacturing and other municipal uses up to an annual average of 339 gallons per person per day, and the use of water without unnecessary waste for drinking or bathing by poultry, cattle and other animals is a beneficial use of either the surface waters of the San Joaquin River or of the underground percolating waters within the Lee Line as more particularly described in Exhibit 3 of these findings."

R. 775, Finding 23.

The Court further decreed the amount of water which could legally be used by Tranquillity Irrigation District, the City of Fresno and other owners of percolating water rights on the alluvial cone of the San Joaquin (Lee's Line, Exhibit II). In fact any parcel of land on the alluvial cone of the San Joaquin known as "Lee's Line." [R. 838-839.][137] Therefore, it is submitted that the Court below clearly was in error in its above ruling.

**G. The Lower Court Is in Error in Holding That the Defendant Bureau of Reclamation Officials May Condemn or Take by Eminent Domain the Rights of the City of Fresno and Other Plaintiffs Given Them by the County of Origin and Watershed Statutes and Decisions of the State of California.**

The District Court held that the City of Fresno, under the California County of Origin and watershed of origin laws was entitled to water to fulfill its municipal and domestic requirements before any water was taken by Respondents out of either the watershed within which lies the City of Fresno, or the County of Fresno—one of the counties in which the San Joaquin River originates[138] and in which county the City of Fresno is also located, by means of the Friant-Kern Canal (*Rank v. (Krug) United States,* 142 F. Supp. 1, (1956).)

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[137]R. 838-839, Judgment.

[138]"* * * The San Joaquin River is a natural watercourse arising in the Sierra-Nevada in Fresno and Madera Counties." *Meridian Ltd. v. San Francisco,* 13 Cal. 2d 424, 429; 90 P. 2d 535, 91 P. 2d 105 (1939).

The District Court further ruled that these priority rights of the City of Fresno were enforceable by *injunction* against the defendant Bureau of Reclamation officials and that if interfered with by the defendant Bureau of Reclamation officials the City of Fresno was not limited to a claim for damages in the United States Court of Claims. (*Rank v. (Krug) United States,* 142 F. Supp. 1 (1956).)

The court below over-ruled the District Court and indicated in its opinion that although the United States had not acquired these rights by either proceedings in condemnation or by seizure under eminent domain that the respondent officials of the United States Bureau of Reclamation could take these rights either by eminent domain or condemnation upon paying for them. *State v. Rank,* 293 F. 2d 340.

It is submitted that this portion of the opinion of the court below is in error since Congress never authorized such a taking of water under the various Central Valley Projects Acts adopted by Congress and that since Congress had not authorized such a taking the defendant Bureau of Reclamation officials are powerless to take these rights by eminent domain, condemnation proceedings or in any other manner, and that respondent officials are acting in excess of their statutory authority in attempting to do so. Appellant's views on this statement of the law now follows:

1. **The Rights of the Defendant Bureau of Reclamation Officials to Take the Water Rights of the City of Fresno and the Other Plaintiffs by Eminent Domain Under the Central Valley Project Are Limited by the Power Expressly Given Them by Congress.**

The power of United States Administrative Agencies is limited by the powers expressly given them by Congress.

> "Where Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (Syllabus)
>
> *Stark v. Wickhard, Secretary of Agriculture*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733. (Syllabus)

(a) *The Power of Eminent Domain Is Vested Solely in Congress.*

The power of eminent domain is vested solely in Congress.[139]

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[139] "The power of eminent domain is vested solely in Congress and the executive has no inherent power in nature of eminent domain." (Syllabus)

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is no act of Government." (Syllabus)

*Youngstown Sheet & Tube Co. v. Sawyer*, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"* * *. Contrary to contention that President had 'inherent' power to be exercised in public interest, the president's power to issue Executive Order directing Secretary of Commerce to take possession of plants of steel companies involved in labor dispute would have to stem either from an act of Congress or from the Constitution itself." (Syllabus)

*Youngstown Sheet & Tube Co. v. Sawyer*, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

**2. Congress Never at Any Time Granted the Defendant Bureau of Reclamation Officials the Power to Take Water Needed in California County or Watershed of Origin by Either Condemnation or Eminent Domain, but Expressly Withheld This Power.**

It having been shown that only Congress had the power to grant to the Bureau of Reclamation officials the right to take property for Central Valley Project operations by either eminent domain or condemnation proceedings, it will now be shown that Congress specifically withheld from the Bureau of Reclamation officials the right to take water needed by the county of origin and watershed of origin under the Central Valley Project.

**3. The Acts of Congress Make the Defendant Bureau of Reclamation Officials Subject to California's County of Origin and Watershed Acts.**

The first enactment of Congress governing the operation of the United States Bureau of Reclamation provided that all reclamation projects must be operated in accordance with state law.

> "Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory relating to the con ol, appropriation, use or destruction of water used in irrigation or any vested right acquired thereunder and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws."
>
> Act of June 17, 1902 (32 Stats. at L. 388, Chapter 1093) 43 U. S. C. 391.

This court has held that the Acts of June 17, 1902, requires respondent officials building reclamation projects to proceed in conformity with California laws.

> "The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 Act, been zealous in maintaining compliance with Section 8 of the 1902 Act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws."
>
> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725 at 740, 70 S. Ct. 955 at 963. Footnotes 14 and 15.

Congress again in 1956 in legislation *concerning the Central Valley Project* readopted the same provisions of the basic reclamation law of 1902.[140]

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[140] "Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this

MOREOVER, CONGRESS SPECIFICALLY BY STATE REQUIRED THE DEFENDANT BUREAU OF RECLAMATION OFFICIALS TO FOLLOW CALIFORNIA'S COUNTY OF ORIGIN AND WATERSHED OF ORIGIN ACTS, both of which expressly prohibit the defendant Bureau of Reclamation officials from taking water needed by either the county of origin or watershed of origin by condemnation eminent domain proceedings.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.
>
> "* * * the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)
>
> Act of Oct. 14, 1949, 63 Stats. 852, 853 (1949).

**4. Administrative Interpretation.**

Administrative interpretation of a statute is also important. The Bureau of Reclamation has interpreted the congressional acts involving the Central Valley Project as requiring them to leave sufficient water in the

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Act, shall *proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government* or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided:* That the right to the use of water acquired under the provisions of this Act *shall be appurtenant to the land irrigated* and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Act of July 2, 1956, 70 Stat. 483 at 484.

county of origin and watershed of origin to satisfy all of the present and ultimate needs of these two areas and only to take *surplus* waters for exportation out of the county of origin and watershed of origin.

> "66. In addition to respecting all existing water rights, *the Bureau* in this report has complied with *California's county of origin legislation,* which requires that water shall be reserved *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere."* (emphasis ours)
>
> Senate Document 113, 81st Congress, page 65, Plaintiff's Exhibit 136, R. 2285.

It will be noted that Respondent Bureau officials said "water" would be reserved for the county and watersheds of origin—not damages.

The above is a clear admission that the Bureau itself has and now administratively interprets the Basic Reclamation Act of 1902 to the effect it is bound by California's *County of Origin and Watershed of Origin* Legislation to leave enough water (not money) to meet the needs of the County of Origin and Watershed of Origin and to only take *surplus water* for their reclamation projects from these areas of origin as shown by the last two lines above quoted from Senate Document 113, 81st Congress (R. 2285) which we again quote:

> "* * * only surplus *water* will be exported elsewhere. * * *."
>
> Senate Document 113, 81st Congress, 1st Session, Plaintiffs' Exhibit 136, R. 2285.

**5. Congressional Committee Reports.**

That the Bureau of Reclamation is prohibited from acquiring water needed by the county of origin and watershed of origin also appears from the latest committee report of Congress dealing with the Central Valley Project, which of course, is a well-recognized aid upon which the courts may rely in interpreting a statute.

> "The opinions of the State Attorney General mentioned above declare that both the State and Federal Govenment in the operation of the CVP are subject to the *restrictions* of the County Origin Law and the Watershed Protection Act." (emphasis ours)
>
> Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246 at page 516 (1956).

Having shown that Congress intended that the defendant Bureau of Reclamation officials' right to take water by either eminent domain or condemnation proceedings was to be limited by the provisions of the California County of Origin and Watershed of Origin Acts, a specific look at these acts, together with the interpretation placed thereon by the California Legislature in adopting these acts by the Attorney General of the state of California, and the California administrative agencies applying them, also clearly indicates that the Bureau of Reclamation may not condemn or take by eminent domain waters needed by the county of origin and watershed of origin.

**6. The California Constitution and Statutes Are Clear and Definite That No Water Needed by Either the Watershed of Origin or County of Origin May Be Diverted by the Defendant Bureau of Reclamation Officials Out of Said County of Origin or Watershed of Origin.**

Until a few years before the Central Valley Project Act, a riparian owner was entitled to have all of the waters of a stream flow past his riparian land. "In order to make the Central Valley Project possible so that the Goverment could take surplus waters from the rivers involved in the Central Valley Project, it was necessary to amend the State Constitution of the State of California which was done November 26, 1928.

> "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably for the beneficial use to be served, * * * provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."
>
> West's Annotated California Codes, Constitution, Article XIV, para. 3, page 265.

California Legislative Enactments also require that only surplus waters may be exported from the county and watershed of origin.[141]

### 7. Reservation of Water for the Areas in Which It Originates Is the Fundamental Law of California Irrespective of Statute According to the Decisions of the California Supreme Court.

Irrespective of the acts of the California Legislature it is the basic and fundamental law of California as shown by the decisions of the California Supreme Court that areas in which water originates shall be protected

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[141] "*Prior Right to Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Water Code, Sec. 11460.

"*Exchange of Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the *watershed* or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were in the exchange, not made, and no right to the use of water shall be gained or lost by reason of any such exchange." (Emphasis ours.)

Water Code, Sec. 11463.

"*Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof,* including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Sec. 1.)" (Emphasis ours.)

Water Code, Sec. 11128.

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation

from exportation out of the area in which waters originate.

*Miller v. Bay Cities Water Co.*, 157 C. 256, 270, 107 P. 115, 27 L. R. A., N. S. 772 (1910); *Burr v. Maclay Rancho Water Co.*, 154 C. 428, 436, 98 P. 260 (1908).

"* * * the doctrine of protection of the watershed of origin has been consistently applied by the California Courts in the protection of riparian and overlying rights in recognition of the facts that the natural advantages of a surface or underground water supply was the principal reason for the settlement and development of the counties and watersheds where water originates. *Bathgate v. Irvine*, 1899, 126 Cal. 135, 143, 58 P. 442; *Peabody v. City of Vallejo*, 1935, 2 Cal. 2d 351, 370, 371, 40 P. 2d 486."

*Rank v. (Krug) United States*, 142 F. Supp. 1 at 150.

**8. The Views of Other California Agencies on the Rights of the City of Fresno and Other Landowners in the County of Origin and Watershed of the San Joaquin River.**

Although we do not agree with all of the State Water Rights Board of the State of California's decision,[142]

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that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)
Water Code, Sec. 10505.

[142] "* * * as a matter of both state and federal law, it appears that the United States, the Bureau of Reclamation as well as its parent organization, the Department of the Interior and the Secretary thereof, are obligated to observe Water Code Sections 11460-11463, in carrying out the Central Valley Project. * * *."

on June 2, 1959, the Board correctly ruled that the defendant Bureau of Reclamation officials were bound to furnish water to the City of Fresno and other landowners.

In the above decision the United States and all parties in this action were present and although there is a judicial review by California Courts provided for this decision, none of the parties asked for a judicial review.

**9. Opinions of the California Attorney General.**

The Attorney General of the State of California both in his opinions to the State Legislature and in his stand before the trial court took the position that the defendant Bureau of Reclamation officials were powerless to take either by proceedings in condemnation or by seizure under eminent domain under the Central Valley Project the rights of the California landowners given them by the county of origin and watershed of origin protective acts.

> "The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the prior-

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State Water Rights Board of the State of California Decision No. D-935, Adopted June 2, 1959, p. 100.

"* * *. Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive areas such as the City of Fresno and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. * * * we believe that *the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 'County of Origin' Sections 10500, 10504 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands.*" (emphasis ours)

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, Page 72.

ity be condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture. * * *"

25 Opinions, Attorney General p. 21. (1955)

The Attorney General of California has clearly ruled that the rights of the county and watershed of origin are not subject to condemnation nor taking by eminent domain. The above opinion was given by California Attorney General "Pat" Brown, dated January 5, 1955, in answer to the following two questions referred to him as California Attorney General:

"(2) Under these code sections, would water appropriated for use in areas outside the county where the water originates, or the watershed where the water originates and areas immediately adjacent thereto, be made available later for use in such local areas, if the water became necessary for their development at some time in the future?

"(3) Are Water Code sections 11460 and 11463 applicable to the United States in the construction and operation of the Central Valley Project?"

25 Opinions, Attorney General p. 9. (1955).

to which above questions California's Attorney General gave the answers:

"(2) In the circumstances specified in the statute, Water Code Sections 10505 and 11460 would require that *water* which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent

thereto, be withdrawn from such outside areas and made available for use in the specified area of origin.

"(3) Water Code Sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project * * *."

25 Opinions, Attorney General p. 9, (1955).

"VI. Reversion of Water to Areas of Preference When Needed.

"From what has already been said, it follows that the interim use of water reserved for counties of origin under section 10505, or for watersheds of origin under section 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case *there would be no right of reimbursement for the project works* which had been used for the interim use of the water exported." (emphasis ours)

25 Opinions, Attorney General p. 27, (1955)

If *waters* originating in the county and watershed of origin heretofore taken and used by the United States in the Central Valley Project may be withdrawn to the county and watershed of origin without even paying for portions of the project rendered useless thereby, how can opposing counsel conceivably argue that the government has the right to take these waters by either condemnation proceedings or eminent domain.

**10. Determination of the Limits of the Statutory Authority of an Administrative Agency, Is a Judicial Function and Is Not a Matter of Administrative Discretion.**

As shown the determination of the limits of the power of defendant Bureau of Reclamation officials of the amount of water they may take from a watershed and county of origin to distant non-riparian lands lying outside of the watershed and county of origin, is a *judicial, not a discretionary administrative decision.*[143]

**11. You Can't Drink Damages.**

The former mayor of the City, in the District Court pertinently summed up the error of the court below, holding that Respondents, by eminent domain can substitute damages for water which the citizens of Fresno need for drinking and other domestic use when he said "You can't drink damages."[144]

**12. Conclusion.**

In view of Section 8 of the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, in view of the Act of July 2, 1956, 70 Stat. 483, 484 and in view of the Act

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[143]"The responsibility of determining limits of statutory authority of administrative agencies is a judicial function." (Syllabus.) *Stark v. Wickhard, Secretary of Agriculture*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733. (Syllabus)

[144]"Q. Mayor, going back to the Attorney General not knowing what we want, did you and I and Mr. Owens hold a meeting with Mr. Goldberg and Mr. Pat Brown in San Francisco?
"A. On Good Friday.
"Q. Good Friday?
"The Court: 1954?
"The Witness: 1954.
"* * *
"A. I remember my answer.
"The Court: What was your answer?
"The Witness: *That you can't drink damages.*" (emphasis ours)

Testimony of Mayor Dunn, Rep. Tr. p. 23,282, lines 10-18; p. 23,284, lines 17-25.

of 1949, 63 Stats. 852, 853 requiring the Secretary of the Interior to give priority to the counties and area of origin,[145] in view of the California Statutes, in view of the administrative determination of the Bureau of Reclamation, and the Acts of Congress heretofore discussed it is respectfully submitted that there are no possible ground for holding that the defendant Bureau of Reclamation officials can come in and take of water badly needed by the City of Fresno for domestic use, having priority over water or irrigation, and distribute it entirely outside of the county and watershed origin by eminent domain or condemnation. As Mayor Dunn said "You can't drink damages".

And as the District Court corrrectly ruled:

> "The City of Fresno does furnish water to its inhabitants for domestic and municipal purposes, by its municipally owned water system.
>
> * * *
>
> "Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point.
>
> "* * *. It is the conclusion of the Court that it is entitled to a declaratory judgment that its rights for domestic and municipal purposes are superior to any right of the United States to

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[145] "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *.

"* * * the Secretary of the Interior shall make recommendations for the use of water in accord with state water laws, *including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.*" (emphasis ours)

63 Stats. 852, 853 (1949).

divert water beyond the watershed or county of origin, or of the defendant district."

*Rank v. (Krug) United States*, 142 F. Supp. 184-185.

Finally, the argument that overruling illegal administrative action might cause frictions between the various branches of the Government is without merit, as stated by this Court.

"The doctrine of the separation of powers was adopted by the convention not to promote efficiency but to preclude the exercise of *arbitrary power*."

*Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

## H. The Court Below Erred in Relieving the Respondent Districts From the Effect of the Injunction of the Lower Court.

### 1. The Basic Reclamation Act of June 17, 1902 Specifically Provided That the Water Under Any Reclamation Project Was Appurtenant to the Lands Served.

"* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Act of June 17, 1902, 32 Stat. 388 at 390 (43 U. S. C. 391).

Under the Central Valley Project legislation Congress in 1956 again re-adopted this feature of the Basic Reclamation Act of 1902.

"* * * that the right to the use of water acquired under the provisions of this Act shall be appurte-

nant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right."

Act of July 2, 1956, 70 Stat. 483 at 484.

Therefore, whatever water rights, subject of course to the right of original plaintiffs, given the districts legally under the contract between California Regional Director of the Bureau of Reclamation, Boke, and the respondent districts became the property of the landowners *subject to all prior rights of plaintiffs and the City of Fresno* wholly distinct of the property right of the government in the irrigation works, when properly acquired.[146]

Therefore, since the respondent districts were the owners of the portion of the rights legally contracted to them, after deducting the water to which the name plaintiffs were entitled to, they were also proper parties as to that part of the waters illegally taken from the plaintiffs.

The Answers of most of the respondent districts, although not claiming they are the legal owners of rights

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[146] "Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A., pages 382-372, provided: "* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated * * * although the government diverted stored and distributed the water, the contention of the petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowners and by the terms of the law * * * *the water rights became the property of the landowners* wholly distinct from the property right of the government in the irrigation works." (emphasis ours)

*State of Nebraska v. State of Wyoming*, 325 U. S. 589, 613; 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);
*Ickes v. Fox*, 300 U. S. 82, 95, 57 S. Ct. 412, 416; 81 L. Ed. 525 (1937).

under a Reclamation project which have been legally contracted to them, claim they are the equitable owners thereof, and as such were proper parties and properly subject to the injunction of the District Court.[147]

> "VII. Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant districts, have become and are the beneficiaries of that trust; * * *"
>
> Excerpt from Answer to Plaintiffs' Complaint as Amended of Defendant Districts, Lindsay-Strathmore Irrigation District, Lindmore Irrigation District, Ivanhoe Irrigation District, Sausalito Irrigation District, Orange Cove Irrigation District, Tulare Irrigation District, Lower Tule River Irrigation District, Stone Corral Irrigation District, Terra Bella Irrigation District, Porterville Irrigation District, Delano-Earlimart Irrigation District and Exeter Irrigation District, filed 10/16/61, R. 158.

The State of California made a similar allegation in their Amended Complaint in Intervention filed August 10, 1951, R. 88, 95. They were to be proper parties

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[147] "II. Answering Paragraph IV of said complaint in intervention, these answering defendants admit the allegations therein contained, save and excepting that defendants allege that the assignments therein set forth were assigned in trust to the United States, all as set forth in Paragraph VII of said Amended Complaint in Intervention."

R. 125, Excerpt from Answer of Southern San Joaquin Municipal Utility District to State of California's Amended Complaint in Intervention, page 2.

and subject to the injunction under the provisions of Section 379, Code of Civil Procedure, State of California.

"Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff."

Calif. Code of Civil Procedure, 379.

**2. All of the Defendant Districts, the Bureau Officials and the State of California, Except the South San Joaquin Municipal Utility District and the Madera Irrigation District, Voluntarily Intervened in This Action and Asked That the Court Make a Decree of Physical Solution, Which Is a Conditional Injunctive Decree.**

The Madera Irrigation District, Chowchilla Irrigation District and South San Joaquin Irrigation District later asked the court in the consent decree of August 24, 1951, and consented to a decree of the court[148]

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[148]"The United States is bound by the statements of the attorneys made at a pre-trial conference concerning matters which are properly under consideration by the Court." (Syllabus.)

*Daitz Flying Corp. v. United States*, 8 Fed. Rules Serv. 16.23 Case 1 (1945).

"When a plaintiff has by his counsel advised the court and defendant of the theories upon which he relies and has given account of these, then the court should not adopt some other theory of recovery even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the counsel for the plaintiff, and it is entire justice to require the defendant to accept some theory of law propounded by the court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the court should not find some other ground on which to deflect the attack."

*Clark v. United States*, 13 F.R.D. 342, 345 (D.C. Oregon) (1952).

"It has been held that an issue stated in the pre-trial order is properly tried even though it is not raised in the pleadings."

Moore's Fed. Practice, Vol. 3, page 1128.

ordering a physical solution and counsel for all three of these districts later at either pre-trial conference or other later petitions of this action, requested the court to make a physical solution. These matters are discussed in full under "History of Litigation".

**3. Here All of the Defendant Districts Have Asked Affirmative Relief and Counter Claimed and Then Proceeded to Trial. It Is Now Too Late to Ask a Dismissal.**

It is submitted under the following authorities that it is too late at this stage of the action for the defendant districts to ask for a dismissal.

"The second sentence of Rule 41(b) provides that after the plaintiff has completed the presentation of his evidence, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief * * *. If the motion is denied, the defendant may proceed to offer evidence. *If he does proceed he waives any right to object later that his motion was erroneously denied.*" (emphasis ours)

Moore's Fed. Practice 5, 1041;

*Century Indemnity Co. v. Nelson*, C. C. A. (9th Cir.), 1936, 90 F. 2d 644.

"Rule 41(c) Dismissal of Counter Claim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counter claim, cross claim or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsible pleading is served or, *if there is none, before the introduction of evidence at the trial or hearing.*" (emphasis ours)

Moore's Fed. Practice 5, 1049.

**4. All of the Defendant Districts Voluntarily Intervened in This Action.**

All of the defendant Irrigation Districts voluntarily intervened in the present action. The effect of such a voluntary intervention has been fully discussed in our brief of October 24, 1961.

**5. Water Rights Are a Form of Real Property and Interference With the Same Is a Trespass.**

"Id. Common Law As To Riparian Rights—Extent And Nature Of Right. By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it." (Syllabus)

*Lux v. Haggin*, 69 Cal. 255, 258 (1886).

**6. The Defendant Districts, as Joint Trespassers, Were Proper Parties in This Action and Were Properly Joined.**

(a) *Because Respondents Claim an Interest in the Controversy.*

"Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff."

Calif. Code of Civil Procedure 379.

"It is enough if he is found acting in concert with them."

52 Am. Jur. 861.

"The official character of the officer does not justify a trespass *and all who form or participate in*

*the trespass are jointly liable with the officer.*" (emphasis ours)

48 Cal. Jur. 2d 32:

*Lewis v. Johns*, 4 C. 629 (1868).

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages."

48 Cal. Jur. 2d 31;

*Foley v. Martin*, 142 C. 256, 75 P. 842 (1904).

(b) *Because They Had an Interest in the Success of Either of the Parties.*

"At any time before trial any person who has an interest in the matter in litigation *or in the success of either of the parties* * * * may intervene in the action or proceeding." (emphasis ours)

C. C. P. 387.

"The right to intervene is not limited to any particular kind or class of actions but is general * * * to avail himself of the right the applicant must have an interest in the matter of litigation *or in the success of one of the parties to the action.*"

20 Cal. Jur. 517.

(c) *Because They Promoted, Encouraged, Advised, Conspired in,* AIDED, ASSISTED, *and* ABETTED *the Commission of the Trespass by the Defendant Bureau of Reclamation Officials.*

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus)

*Kirby Lumber Corporation v. Karpel*, 233 F. 2d 373 (5th Cir.) (1956).

"31. Co-trespassers—It may be stated as a general rule that all persons who command, instigate, promote, *encourage, advise, countenance, co-operate in, aid*, or *abet* the commission of a trespass, or who approve it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves." (emphasis ours)

52 Am. Jur. 861.

(d) *Because Respondents Approved the Illegal Actions of the Defendant Officials Which Were Done for Their Benefit.*

"Co-trespassers * * * all persons * * * who approve of it (a trespass) if it was done for their benefit. * * *."

52 Am. Jur. 861.

(e) *Because They Ratified the Illegal Acts of the Defendant Bureau of Reclamation Officials "Ratification of Trespass" Is Ground Here.*

"32. *Ratification of Trespass—By Ratification* or *adoption* of a trespass committed for one's benefit, a person may, although absent when the trespass was committed, become a principal and liable accordingly, even though the act was not done in obedience to his command or at his request." (emphasis ours)

52 Am. Jur. 862.

By entering into a contract with the defendant Bureau of Reclamation officials after knowledge of the lawsuit, accepting the benefits of the valuable irrigation water, furnishing attorneys and engineers at the trial of the action, and participating in the trial for a period of 18 months, the defendant Districts clearly ratified the illegal actions of the defendant officials and were clearly proper parties in the present action.

(f) *Because the Defendant Districts Encouraged the Defendant Officials' Trespass Against the Plaintiffs.*

"33. Persons Authorizing, Encouraging, or Directing Trespass. Any Person who aids, abets, encourages, or authorizes another in the commission of a trespass, even though not personally present at its commission, is liable equally with him who commits it."

52 Am. Jur. 862.

(g) *The Respondents Authorizing the Doing of an Act of Trespass by Another, or Ordering the Doing of a Trespass, or Advising It, Encouraged, Procured, or Incited the Acts of the Bureau Officials and Were Therefore Liable. The Respondents Need Not Be Present in Order to Be Liable.*

"The person authorizing the doing of an act of trespass by another is liable, whether the authorization is express *or implied.* * * * advises it, encourages, procures, or incites it, or conspires with the actual doer for the doing of it is liable. * * *." (emphasis ours)

87 C. J. S. 987.

"* * *. In general, anyone who aids or cooperates with another in the commission of a trespass is liable for it."

87 C. J. S. 987.

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus)

*Kirby Lumber Corporation v. Karpel,* 233 F. 2d 373 (5th Cir.) (1956).

"'* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.'" (*McDaniel Bros. v. Wilson,* Tex. Civ. App. 70 S. W. 2d 618, 621.)

*Kirby Lumber Corporation v. Karpel,* 233 F. 2d 373, 375.

(h) *Defendant District Liability Is Not Excused Even Though the Acts of Defendant Bureau Officials Be Considered Those of an Independent Contractor.*

The fact that the defendant Districts had a contract with the defendant Bureau of Reclamation officials does not relieve the Districts; the Districts were still co-trespassers.

"'* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.'" (*McDaniel Bros. v. Wilson,* Tex. Cix. App., 70 S. W. 2d 618, 621.)

*"The rule stated is applicable where the party who cut the timber is an independent contractor. (Cummer Mfg. Co. v. Copeland, Tex. Civ. App., 35 S. W. 2d 758.)"* (Syllabus) (emphasis ours)

*Kirby Lumber Corporation v. Karpel*, 233 F. 2d 373, 375 (5th Cir.) (1956).

(i) *Nor Is It Excused if We Consider the Illegally Acting Bureau Officials as Agents of the Defendant District. Both Are Liable.*

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages.

48 Cal. Jur 2d 31.

"In action to enjoin alleged tortious misconduct of officials of government railroad in interfering with plaintiff's business of lightering ships by preventing plaintiffs from using a dock necessary to that business the government was not an indispensable party even though action involved question as to whether the United States or City owned dock since action could conclude nothing against United States."

*Berger v. Ohlson*, 120 F. 56 (9th Cir.) (1941).

## I. To Deny the City of Fresno Water From the Central Valley Project Would Violate Its Rights Under the First and Fifth Amendments to the Constitution of the United States.

As stated Fresno can only pump half of its needs from the underground and even less if the District Court's plan of physical solution is not adopted. The only possible source for a supplemental supply of water is from the Central Valley Project. This is shown from the decision of the District Court in this case.

"(265) Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point."

"* * *.

*"The City of Fresno lies in a position of great natural advantage insofar as water is concerned; it is but a short distance from two rivers, the San Joaquin and the Kings, with a combined average annual flow of approximately 3,000,000 acre-feet. And yet, it is now in the anomalous position of being short of water to supply its inhabitants for the highest and best use, with the United States astride both rivers with gigantic dams exporting water to irrigation districts in counties and watersheds other than the San Joaquin and Kings, which water it used not as primary supply, but as a supplemental supply for irrigation and agricultural purposes, declared by California law to be secondary to the highest and best uses of municipalities for domestic purposes."*

*Rank v. (Krug) United States,* 142 F. Supp. 1, 184-185 (1956).

It is submitted that to deny the City of Fresno its needed supply of its highest priority water would in the words of Judge Brandeis, in his dissenting opinion in the *Burleson* case, where a publisher was denied the right to use second class mail, would be a violation of the city's rights given it under the First and Fifth Amendments to the Constitution of the United States.

"A law by which certain publishers were unreasonable or arbitrarily denied the *low rates* would

deprive them of liberty or property without due process of law; and it would likewise deny them the equal protection of the laws.

"* * *. It would be going a long way to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments to the Constitution."

*United States v. Burleson*, 255 U. S. 407, 41 S. Ct. 325, 65 L. Ed. 704 (1921).

## IX.
## CONCLUSION.

It is submitted that the maintenance of this suit is to protect the very life and existence of the City of Fresno, the riparian owners between Friant Dam and Gravelly Ford Canal and the underground percolation water supply of 100,000 acres of valuable land, the majority of which lies in the county producing the greatest volume of agricultural products in the world, and that this Court has said no apology need be made for this litigation involving the Central Valley Project of California.

"* * *. There have at times been differences, but these are inevitable in the everyday implementation of such a giant undertaking."

*Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 279-280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958).

As to the relief sought we pray as follows:

That this Court reverse the Court below in the matters in which the Court below reversed the District Court in its decisions in *Rank v. (Krug) United States*,

142 F. Supp. 1 (1956) and affirm the decision of the District Court in its entirety in that case; or if this is too broad a prayer we ask this Court to:

1. Affirm the decision of the Court below in all particulars in which it did not reverse the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

2. Reverse the Court below on the following points:

(a) Reverse the holding of the Court below that respondent Bureau of Reclamation officials can take the riparian and percolating water rights of the landowners between Friant and Gravelly Ford Canal, said reversal to be on the ground that Congress has never authorized a taking of these rights.

(b) Reverse the holding of the Court below that respondent Bureau officials can take either by eminent domain or condemnation the overlying percolating water rights of appellant City of Fresno, said reversal to be on the ground that Congress has never authorized such taking.

(c) Reverse the holding of the Court below that the determination of the statutory limits of authority of respondent Bureau officials is an administrative and not a judicial determination.

(d) Reverse the holding of the Court below that the determination of whether the charge for water to the City of Fresno out of the Central Valley Project is reasonable or unreasonable, arbitrary,

capricious or in excess of their statutory authority is an administrative and not a judicial decision.

(e) Reverse the holding of the Court below that the determination of whether rates charged for water by respondent Bureau official to the City of Fresno in excess of $3.50 per acre-foot (Class I irrigation water) is unreasonable, arbitrary, capricious and in excess of the authority of respondent Bureau officials in an administrative and not a judicial determination and that such a determination is a suit against the United States.

(f) Reverse the holding of the Court below that the City of Fresno is not entitled as a matter of judicial determination to purchase necessary water out of the Central Valley Project at rates which are not unreasonable, arbitrary, capricious or in excess of the statutory authority of respondent officials to the extent of the needs of the City of Fresno.

(g) Reverse the holding of the Court below that respondent districts should be relieved of the injunction the District Court imposed on the districts and respondent Bureau officials and sustain the holding of the Court below refusing to dismiss the respondent districts as parties herein.

(h) Reverse the holding of the Court below that the United States has not waived its immunity to suit in this action under the Act of July 10, 1952, 66 Stat. 516, and the Reclamation

Act of June 17, 1902, 32 Stat. 388, and other actions of government officials.

(i) Specifically hold that respondent Bureau officials are not authorized by Congress to add a profit to water rates charged cities under reclamation projects in addition to repayment of a proportionate share of construction costs and operation and maintenance costs plus interest at not to exceed 3½ per cent.

(j) Affirm the decision of the District Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956) that any charge to the City of Fresno for water out of the Central Valley Project which has no municipal or domestic priority such as has been offered to the City of Fresno at rates not greater than Class I irrigation rates ($3.50 per acre-foot) is unreasonable since no point on designation on points on appeal was made by any respondent and since no point was raised by any respondent on this point in any petition for certioarari in this court.

(k) Reverse the Court below and specifically affirm the decision of the District Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956), that the City of Fresno is entitled as a matter of right (in accordance with the California watershed and county of origin statutes and the California domestic and municipal priority statutes which the Respondent officials are required to carry out by

virtue of the basic reclamation law of 1902 and the various acts of Congress governing the Central Valley Project which provide that the project and particularly Friant Dam shall supply the domestic and municipal water needs of the City of Fresno) to water out of the Central Valley Project sufficient to supply its needs. Or this Court should at least hold Fresno entitled to a minimum of 100,000 acre-feet per year of Central Valley Project water which *engineers for respondent officials* were the minimum water requirements of the City of Fresno.

Respectfully submitted.

JOHN H. LAUTEN and
CLAUDE L. ROWE.
*Attorneys for Appellant*
*City of Fresno.*

Dated: October 20, 1962.

## APPENDIX "A".

### Opinions of the Court Below.

United States Court of Appeals for the Ninth Circuit
State of California, United States of America, et al., Appellants, v. Everett G. Rank, et al., Appellees.

No. 15,840 Aug. 14, 1961.

Before: Hamlin and Merrill, Circuit Judges, and Powell, District Judge.

Upon petitions for rehearing filed herein by the State of California, the City of Fresno and the San Joaquin Municipal Utility District,

IT IS ORDERED:

(1) The opinion heretofore filed herein is corrected in the following respects:

(a) The following language is stricken from page 4 of the slipsheet opinion as printed by this court at the end of the first full paragraph: "The processing of these applications has been halted pending the outcome of this case."

(b) The following language is stricken from the third full subparagraph on page 18 of the opinion: "The processing of these applications has been held up pending the outsome of this case.'

(c) The following is added to footnote 7, page 19, of the opinion:

Water Code §11463:

"Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of

the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part."

(2) The petition of the City of Fresno is denied.

(3) The petition of the State of California is granted. Briefs shall be filed within the times prescribed by Rule 18 of the Rules of this court, including and opening brief by petitioner unless it elects to stand upon its petition and waive further opening statement.

(4) The petition of San Joaquin Municipal Utility District is granted subject to the same provision with reference to briefs.

(Endorsed) Order on Rehearing Filed Aug. 14, 1961.

Frank H. Schmid, Clerk.

## APPENDIX "B".

### Constitution of the United States.

"Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## APPENDIX "C".

### Acts of Congress.

1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the pay-

ment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided,* that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert and shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Act of March 3, 1877, 19 Stat. 377.

"SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the

acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided,* That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"* * *.

"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That *the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (Emphasis ours.)

Act of June 17, 1902, 32 Stat. 388 at 390 (43 U. S. C. 391).

"Chap. 1631. An Act Providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes.

"* * *

"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, *and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same* source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." (emphasis ours)

Act of April 16, 1906, 34 Stats. 116-117.

"Chap. 86.—An Act For furnishing water supply for miscellaneous purposes in connection with reclamation projects.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other

purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided,* That the approval of such contract by the water users' association or associations shall have first been obtained: *Provided,* That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further,* That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further,* That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

Approved, February 25, 1929."

Act of February 25, 1920, 41 Stat., 451-452.

"Chap. 285.—An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

"* * *.

"Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Act of June 10, 1920, 41 Stat. 1063 at 1077.

"Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

Act of December 5, 1924, 43 Stat. 672 at 702.

"CHAP. 42—An Act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water * * *.

"* * *.

"Sec. 4 * * *

"(5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses, * * *.

"(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

"* * *.

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue occuring under the reclamation law and under this Act, will in his judgment cover all

expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Act of December 21, 1928, 45 Stat. 1057 at 1059-1060.

"*Resolved by the Senate and House of Representatives of the United states of America in Congress assembled,* That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000 * * *. * * * (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation $500,000,000; * * * (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; * * *."

Emergency Relief Appropriation Act of 1935, 49 Stat. 115.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following works of improvement

of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; * * *.

"* * *.

"Sacramento River, California; Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress; * * *."

Act of August 30, 1935, 49 Stat. 1028 and 1038.

"Bureau of Reclamation

"* * *.

"Central Valley Project, California: For continuation, $6,900,000, to remain available until June 30, 1937, of which $6,000,000 shall be available for construction of Friant Reservoir and irrigation facilities therefrom in the San Joaquin Basin and $250,000 for administrative expenses (including personal services in the District of Columbia and elsewhere), to be available for the same purposes as those specified for projects included in the Interior Department Appropriation Act for the fiscal year 1937 under the caption 'Bureau of Reclamation' and to be reimbursable under the Reclamation Law: *Provided*, That not to exceed $25,000 may be expended for personal services in the District of Columbia."

Act of June 22, 1936, 49 Stat. 1597 at 1622.

"Sec. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in

Rivers and Harbors Committee Document Numbered 85, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028 at 1033), entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project,

and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with state agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further*, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power."

Act of August 26, 1937, 50 Stat. 844 at 850.

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an *appropriate share* as determined by the Secretary of that part of *the construction* costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover *an appropriate share of the annual operation* and maintenance cost and *an appropriate share of such fixed charges* as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year * * *." (Emphasis ours.)

Act of August 4, 1939, Stat. 1187 at 1194.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized. * * *.

"The second proviso in Section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: '*Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized * * *, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered. * * *.'"

Act of October 17, 1940, 54 Stat. 1198 and 1200.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States dian, of such waters for domestic, municipal, stock wate shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water irrigation, mining, or industrial purposes.

"* * *.

"Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts."

Act of December 22, 1944, 58 Stat. 887 at 889-890.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized to include the American River development as hereinafter described, which development is declared to be for the same purposes as described and set forth in the Act of Congress of August 26, 1937 (50 Stat. 850).

"Sec. 2. * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Act of October 14, 1949, 63 Stat. 852 and 853.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the entire Central Valley project heretofore authorized under the Act of October (should be August) 26, 1937 (50 Stat. 844, 850), and the Act of October 17, 1940 (54 Stat. 1198, 1199), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, * * *.

"Sec. 2. The features herein authorized shall include an irrigation canal, * * * so as to permit the most effective irrigation of the irrigable lands lying in the vicinity of said canal and supply water for industrial, domestic, and other beneficial uses for these lands in Tehama, Glenn, and Colusa Counties * * *."

Act of September 26, 1950, 64 Stat. 1036.

"Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are in-

applicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

Act of July 10, 1952, 66 Stat. 516 at 560.

"Sec. 2. The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act.

"Sec. 3. As used in this Act, the term 'long-term contract' shall mean any contract the term of which is more than ten years.

"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Approved July 2, 1956."

Act of July 2, 1956, 70 Stat. 483 at 484.

"(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, eff. March 19, 1948."

Rule 75(d), Federal Rules of Civil Procedure, (28 U. S. C.)

"(i) *Order as to Original Papers or Exhibits.* Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper."

Rule 75(i), Federal Rules of Civil Procedure, (28 U. S. C.)

## APPENDIX "D".

### Federal Documents.

"Feasibility Report of 1935"

The Secretary of the Interior
Washington
November 26, 1935

"The President
The White House,

"My dear Mr. President:

"The Supreme Court of the United States in the Parker Dam decision *United States v. State of Arizona,* 295 U.S. 174, 55 S. Ct. 666, 79 L. Ed. 1371 indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

"Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902, (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

"Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702) provides as follows:

" 'That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water

supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States.'

"General Description of Project.

"The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled, irrigated and productive land, and a population of 90,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

"The key unit of the project is Kenneth Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation and municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in re-

cent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the projects—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

"The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

"WATER SUPPLY

"The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department

and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

"ENGINEERING FEATURES

"The principal engineering features of the project are as follows:

"Kennett Dam Unit—the Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k.v.a. power plant will be located below the dam. A regulating afterbay with a 50,000 k.v.a. power plant will be constructed below the Kennett Dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch or Suisun Bay.

"Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

"San Joaquin Pumping System—The works for this pumping station will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of

1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

"Friant Reservoir—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

"Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

"Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

"ESTIMATED COST OF PROJECT

| | |
|---|---|
| Kennett dam, reservoir and power plants | $ 84,000,000 |
| Kennett transmission line and substation | 14,000,000 |
| Contra Costa Conduit | 2,500,000 |
| San Joaquin Pumping System | 19,000,000 |
| Friant dam and reservoir | 14,000,000 |
| Friant-Kern Canal | 26,000,000 |
| Madera Canal | 3,000,000 |
| Rights of way, water rights and general expenses | 8,000,000 |
| TOTAL | $170,000,000 |

"First Year Construction Program.

"Under date of September 10, 1935, you approved an allocation of $20,000,000 for the Central Valley Project, which amount was later reduced to $15,000,000. Construction on the following units is recommended for the first year:

"Kenneth Reservoir Unit Contra Costa Conduit"

Friant Dam and Canals.

"An amount of $15,000,000 can be efficiently and economically expanded on the foregoing units during the first year of construction.

"Adaptability of Land for Irrigation,

CROP PRODUCTION AND SETTLEMENT

"The climate is favorable and the soil, if water is available, is adaptable to the production of a wide variety of crops. The principle crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

"The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities, imported into the

state. Products are largely non-competitive with other sections of the country, since many of them such as nuts, figs, raisins, asparagus are produced almost wholly in California.

"Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

"The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

"Social and Economic Values.

"The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin Valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

"Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural mainte-

nance phase of the project. Here 400,000 irrigated acres with an annual crop value of $30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants produce annually $100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

"Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be $12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of $12,000,000 for it.

"A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

"PROBABLE RETURN TO RECLAMATION FUND OF COST OF CONSTRUCTION.

"The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from

the project works. The estimated cost of construction is $170,000,000 and the annual cost, including repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

"I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

"The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

"Sincerely yours,
"(Sgd.) Harold L. Ickes,
"Secretary of the Interior.

"Approved: Dec. 2, 1935.
"Franklin D. Roosevelt,
"President."

"Letter from the Chief of Engineers, United States Army

"Report of the Board of Engineers for Rivers and Harbors on Review of Reports Heretofore Submitted on Sacramento, San Joaquin, and Kern Rivers, Calif.

*Page 2.*

"5. Subsequent to the submission of the report therein under review, the State of California has enacted enabling legislation for the construction of the Central Valley Project and for the issuance of bonds in the amount of $170,000,000 therefor, which embraces the works set forth in the comprehensive plan previously described to include the Kennett Dam on the Sacramento River, with afterbay and with a transmission line leading therefrom to the head of the San Francisco Bay region; a channel or canal with all necessary dams, pumping plants, and lines of conduit to convey a supply of water for irrigation and other benefits and uses up the San Joaquin River; for a storage dam on the San Joaquin River at Friant; and for canals and conduits to distribute the water conserved by the project.

*Page 12.*

"Central Valley Project.

"* * *.

"15. By an act of the State legislature, confirmed by a general election held December 19, 1933, there has been created a State water project authority which is empowered to issue revenue bonds and to construct, operate, and maintain the Central Valley project. The Governor of California, acting in behalf of the State

water project authority has made application to the Public Works Administration for construction of the initial units of the Central Valley project as a non-Federal project under the National Industrial Recovery Act. * * *.

*Page 14.*

"Conclusions and Recommendations.

"22. There is real need and economic justification for conservation of water resources in the Sacramento-San Joaquin Basin. Under the circumstances it is believed that in order to facilitate prosecution of the Central Valley project by the State of California under the provisions of the National Industrial Recovery Act, the United States would be warranted in approving a 420-foot dam for the Kennett Reservoir and in contributing to the first cost of the reservoir its full value to both flood control and navigation as estimated in the final report under review, or, in round numbers, the sum of $9,000,000. This contribution to be made directly, and in addition to any grant, based on 30 per cent of the cost of labor and materials, made toward (page 15) construction of the reservoir as a non-Federal project under the Public Works program."

Document No. 35, 73rd Congress, 2d Session.

# APPENDIX "E".

## 1. California Constitution.

Sec. 3. Conservation of water resources; restriction of riparian rights

"Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is

lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. (Added Nov. 6, 1928.)"

## 2. California Water Code Sections.

"*State use and control of water.* It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606, Section 104.)"

*California Water Code Section 104*

"*Highest uses of water; domestic; irrigation.* It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. (Stats. 1943, c. 368, p. 1606, Section 106.)"

*California Water Code Section 106*

"Policy guiding action on applications. In acting upon applications to appropriate water the department shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water. (Stats. 1943, c. 368, p. 1616, Section 1254.)"

*California Water Code Section 1254*

"*Municipal priority.* The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of

whether it is first in time. (Stats. 1943, c. 368, p. 1623, Section 1460.)"

*California Water Code Section 1460*

"*Applications; filing; formalities; priority; diligence.* The Department of Finance shall make and file applications for any water which in it judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.

Any application filed pursuant to this part shall be made and filed pursuant to Part 2 of Division 2 of this code and the rules and regulations of the State Engineer relating to the appropriation of water insofar as applicable thereto.

Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto. Until October 1, 1959, or such later date as may be prescribed by further legislative enactment, the statutory requirements of said Part 2 of Division 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1953, c. 1522, p. 3184, Section 1; Stats. 1955, c. 1248, p. 2282, Section 1.)"

*California Water Code Section 10500*

"*Release and assignment of priority; assignee defined.* The Department of Finance may release from priority or assign any portion of any appropriation filed by it under this part when the release or assignment is for the purpose of development not in conflict with

such general or coordinated plan. The assignee of any such application, whether heretofore or hereafter assigned, is subject to all the requirements of diligence as provided in Part 2 of Division 2 of this code. "Assignee" as used herein includes, but is not limited to, state agencies, commissions and departments, and the United States of America or any of its departments or agencies. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1951, c. 445, p. 1458, Section 3, operative October 1, 1951.)"

*California Water Code Section 10504*

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)"

*California Water Code Section 10505*

"The construction, operation, and maintenance of the project as provided for in this part is in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions, and the provisions of this part shall therefore be liberally construed to effectuate the purpose and objects thereof. (Added Stats. 1943, c. 370, p. 1896.)"

*California Water Code Section 11126*

"The authority and the department shall be regarded as performing a governmental function in carrying out the provisions of this part. (Added Stats. 1943, c. 370, p. 1896.)"

*California Water Code Section 11127*

"*Limitations.* The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Section 1.)"

*California Water Code Section 11128*

"*Primary purposes.* Shasta Dam shall be constructed and used primarily for the following purposes:

"(a) Improvement of navigation on the Sacramento River to Red Bluff.

"(b) Increasing flood protection in the Sacramento Valley.

"(c) Salinity control in the Sacramento-San Joaquin Delta.

"(d) Storage and stabilization of the water supply of the Sacramento River for irrigation and *domestic use.* (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

*California Water Code Section 11207*

"*Composition; location.* The unit designated as Friant Dam consists of a dam, reservoir, and one or more hydroelectric power plants to be located on the San Joaquin River at or near Friant. (Added Stats. 1943, c. 370, p. 1896.)"

*California Water Code Section 11225*

"*Purposes.* Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and *domestic* use, and secondarily for the generation of electric power and other beneficial uses. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

*California Water Code Section 11226*

"*Prior right to watershed water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added Stats. 1943, c. 370, p. 1896.)"

*California Water Code Section 11460*

"*Exchange of watershed water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange. (Added Stats. 1943, c. 370, p. 1896.)"

*California Water Code Section 11463*

### 3. California Statutes.

"Sec. 4. Said Central Valley Project as hereby authorized shall consist of the following units:

"(1) Kennett Dam. (Now known as Shasta Dam) A dam, reservoir and hydroelectric power plant, or plants, with necessary afterbay and regulatory appurtenant works located on the Sacramento River, at or near Kennett, Shasta County, California; also a transmission line having capacity sufficient to transmit all the electric energy which can be generated at said dam, including substations, transformer stations, and other facilities for the distribution of power from Kennett Dam to a central substation near the city of Antioch, which transmission line shall be located in such manner and along such route as shall enable the most convenient distribution of electrical energy to the load centers traversed thereby, or capable of service therefrom. Said unit is designated as the Kennett Dam, and shall be constructed and used primarily for improvement of navigation on the Sacramento River to Red Bluff, for increasing flood protection in the Sacramento Valley, for salinity control in the Sacramento-San Joaquin Delta, and for storage and stabilization of the water supply of the Sacramento River *for irrigation and domestic use*, and secondarily for the generation of electric energy and *other beneficial uses*. Said dam shall be built to such height, said reservoir shall have such capacity and said power plant or plants shall be of such capacity as the authority shall determine; pro-

vided, that said reservoir shall have a storage caapacity of not less than two million, nine hundred and forty thousand acre-feet of water." (emphasis ours)

Statutes of California 1933, 50th Session, Chapter 1043, 2643, 2644. (Approved by the Governor August 5, 1933; Initiative vote of the People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934.)

"(4) Friant Dam. A dam, reservoir and hydroelectric power plant, or plants, to be located on the San Joaquin River, at or near Friant, Fresno County, California. San Joaquin River. Said unit is designated as Friant Dam, and shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use, and secondarily for the generation of electric energy and other beneficial uses. Said dam shall be built to such height, said reservoir shall have such capacity and said power plant, or plants, shall be of such capacity as the authority shall determine; provided, that said reservoir shall have a capacity of not less than four hundred thousand acre-feet of water." (emphasis ours).

Statutes of California, 1933, 50th Session, Chapter 1043, 2643, 2645. (Approved by the Governor August 5, 1933; initiative vote of the People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934.)

"Article 11. Notice of Application.

"712. Issuance of Notice by Board. As soon as practicable after receipt of an application which is complete, a notice relative thereto will be issued by the board and the applicant will be directed to post or publish it as required by law.

*"History: 1. Amendment filed 3-10-60; effective thirtieth day thereafter (Register 60, No. 5).*

APPENDIX "F".

Statement of Government Officials.

THE FRESNO BEE Saturday, June 23, 1962 9-A

# Reclamation Program Profit Yield Is Noted

COLORADO SPRINGS, Colo.—AP—Reclamation Commissioner Floyd E. Dominy said the government's reclamation program is a profit making enterprise in the returns it brings to the federal treasury.

"To be sure, not all of its profits occur in a form presentable on financial statements," he said in an address at a luncheon of the American Bankers Association.

"There are examples, however, of reclamation projects, in being and under development, which will return significant surpluses to the federal treasury in addition to repayment of all reimbursable costs.

"Perhaps the most significant of these is the Central Valleys Project of California, which at present contemplates surplus revenues of some $200 million within the payout period of the presently authorized project."

Dominy said for every dollar invested since reclamation projects were started, "92 cents are scheduled for return to the national treasury in direct cash reimbursement.

"Funds invested in power and municipal and-industrial water supply functions are returned fully with interest. Those devoted to irrigation development are returned without interest as a matter of long standing federal policy."